FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

No. 610

EMANUEL WEISS, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

No. 619

LOUIS CAPONE, *Petitioner,*

against

THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*

BRIEF FOR PETITIONERS

I. MAURICE WORMSER,
J. BERTRAM WEGMAN,
Counsel for Petitioner Buchalter.

ARTHUR GARFIELD HAYS,
JOHN SCHULMAN,
Counsel for Petitioner Weiss.

SYDNEY ROSENTHAL,
Counsel for Petitioner Capone.

INDEX

Appendix

CASES CITED

STATUTES CITED

TEXTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' BRIEF

Opinions Below

The four opinions written in the Court of Appeals of the State of New York are reported officially, 289 N. Y. 181. The *Per Curiam* opinion of that Court denying the motion for reargument is reported officially, 289 N. Y. 244.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 344(b), Title 28, U. S. C. (Sec. 237 of the Judicial Code, as Amended),* on the ground that petitioners were denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States* in that they were deprived of due process of law in the proceedings below. The petitions for a writ of certiorari were denied by this Court by order filed February 15, 1943. Thereafter, on March 15, 1943, this Court granted a petition for rehearing, vacated the order denying certiorari and granted the petition for a writ of certiorari.

---

* Appendix, *infra*, pp. 80, 82

Statement of the Case

Joseph Rosen was murdered on September 13, 1936.* In May, 1940, petitioners (and others who were not tried) were indicted of the crime. In September, 1941, the trial began. In December, 1941, they were convicted of murder in the first degree, and sentenced to death.

"The theory of the prosecution's case was that the defendant Weiss was one of the slayers; that the defendant Capone was one of those who had arranged for the murder, who had laid out the route to be taken by the automobile used in it and that he and others were waiting with two cars at the other side of the trestle on Junius Street, to assist in the escape of the slayers; that the defendant

---

* In the prosecution's brief submitted to the New York Court of Appeals, what the People claimed to have proved regarding the discovery of the crime was thus stated (the figures in parentheses which are part of the following quotation have reference to the folios of the printed record on appeal):

"On Sunday, September 13, 1936, at about 7 o'clock in the morning, a police officer's attention was attracted by the cry of a man standing in the middle of the street, shouting, 'Police! Murder! Help!' Upon responding to the call the officer was directed to a small candy store located at 725 Sutter Avenue, Brooklyn. Inside the store lay the proprietor, Joseph Rosen, flat on his back, his face, neck and shirt drenched with blood, his body riddled with seventeen bullet holes (999-1007, 1928-29).

"The man whose cry summoned the police officer was a tailor who lived across the street from the Rosen candy store. At about 6:45 o'clock that morning he heard a shot; he ran to the window, saw an automobile driving away from in front of Rosen's store, and at the same time observed Rosen's body lying on the floor. Fortunately, the tailor memorized the license number of the automobile and quickly ran to the street to call for help. He then reported his information to the police officer, who immediately sent out an alarm for a black sedan bearing license number L-19[illegible]7 and carrying three or four occupants (965-80, 1002-05).

"Later that morning the wanted automobile was found abandoned on Van Sinderen and Livonia Avenues near an L. R. T. and B. M. T. railroad station, at which there was a trestle or footbridge leading to the other side of the railroad tracks (1138-49). The operator of a newsstand at the station testified that at about 7 o'clock that morning the automobile came speeding around the corner of Livonia

Buchalter, referred to as Lepke by the witnesses throughout the trial, had ordered the death of Rosen through fear that he would testify against him in the so-called Dewey investigation, involving racketeering and extortion" (Conway, *J.*, R. 4031).

No witness saw the actual murder.

The entire case against petitioners depended upon the testimony of the witnesses Bernstein, Rubin, Berger, Tannenbaum and Magoon.* Bernstein was the only one who

---

and Van Sinderen Avenues, 'screeching' as it made the turn, and then came to a sudden stop. Four men, he said, emerged from the automobile, walked by his newsstand and then up toward the trestle or footbridge. He could not, however, identify any of the men (1152-77).

"At about 11 o'clock on the same morning a pedestrian discovered a gun lying in the grass near the sidewalk quite some distance away from Rosen's candy store. The gun was turned over to the Ballistics Bureau of the Police Department (1190-1219, 1228-29). The ballistics expert also had in his possession eight spent bullets which were found at the scene of the crime (1238-41). Two of these bullets were removed from the victim's head and neck (1054-61, 1079); four others were pried out of the floor directly beneath the body; another was extracted from the floor near the body, and still another, which passed through the wall of the candy store, was recovered in the millinery shop next door (1090-1124).

"The ballistics expert found that four of these bullets had been fired from the gun found by the pedestrian and that the others had been fired from a gun of similar make (1283-1302). Further examination disclosed that the serial numbers of the gun had been mechanically removed and that the obliteration was so thorough that all scientific means generally employed to reveal those numbers were of no avail (1259-67). In addition to the obliteration of the serial numbers it was also discovered that the gun had received other mechanical treatment after it had left the factory. At the muzzle end of the barrel a thread had been cut for the attachment of a 'silencer' to muffle the sound of a report. The 'silencer' was not affixed to the gun, but the threading for it was covered by a 'collar' (1244-47)."

* Rubin, Berger and Tannenbaum did not implicate Capone; Bernstein and Magoon did not mention Buchalter; Rubin said nothing about Weiss. Although it does not appear in this Record, it is a matter of official Court Record in New York that each of these witnesses has gone scot-free, except Tannenbaum, who was permitted to plead guilty to manslaughter, whereupon sentence was suspended.

said he was at the scene of the crime, although he did not see the shooting. Rubin and Berger testified regarding preparation; Tannenbaum and Magoon testified to alleged admissions. Of this, and of these individuals, the Chief Judge of the New York Court of Appeals, who voted to affirm, said (R. 4070-71): "There can be no question that the only proof against these defendants comes from witnesses who in their testimony against these defendants proved their own guilt of the murder of Rosen and from other witnesses who, though denying guilty complicity in the Rosen murder, admitted guilty complicity in other murders and hideous crimes."*

Bernstein, described by the dissenting Judges below (R. 4079) as "* * * a former perjurer who perversely and flagrantly lied again to the jury on this present trial" "* * * was the chief of the prosecution witnesses." He is an admitted murderer with a long record of nefarious activities. His testimony was that, early in the afternoon of September 11, 1936, he was an onlooker at a street corner meeting of petitioners Weiss and Capone with Strauss and Cohen (the latter two, named as defendants in the indictment, were not tried). Upon instructions then given by Strauss, Bernstein stole an automobile which he later used to drive the alleged murderers to and away from the scene of the murder. He said he was taught the "get-away" route by petitioner Capone. In effect, he purchased immunity by testifying.**

---

* This sentence, which appears in the Record, and was contained in the opinion as filed, has been deleted from the official report (cf. 289 N. Y. 222).

** The dissenting Judges said (R. 4081-82): "For more than a year prior to this trial Bernstein had been kept in custody at a hotel as one of a group described by him as members of 'the mob'. The main contention of the defense was that Bernstein's testimony against the defendants had been there fabricated by this group in an endeavor to shift the incidence of the death penalty for the killing of Rosen. This contention went to the heart of the People's case. (*People* v. *Becker*, 210 N. Y. 274, 308-309.) As an answer, Bernstein testified that during his confinement in the hotel he was under surveillance day and night by the police. Though that testimony was uncorroborated, the trial judge refused to let the jury pass

Rubin, an admitted liar and extortionist, who expressed intense hatred for Buchalter (R. 1494), was called as a witness to provide proof of motive for the murder. The substance of his testimony was that Rosen had been forced out of business by Buchalter; that with the appointment of Special Prosecutor Dewey, Buchalter became worried over the possibility that Rosen might furnish Dewey with information; that on September 11, two days before the murder, Buchalter had made threats against Rosen; that after Rubin reported his inability to placate Rosen, Buchalter then sent him to summon Berger, and that subsequent to the murder Buchalter had induced Rubin to flee from the jurisdiction.

---

upon its credibility. More than that, the judge certified to the trustworthiness of that testimony in this way: 'You cannot lock criminals together when they are waiting their turn to be called to testify and let them put their heads together and maybe plot something behind the backs of the police. That would be sloppy police work, to permit discussion.' The judge was without power so to invade the province of the jury.

"On cross-examination, Bernstein denied any letter had been written or sent by him while he was in custody at the hotel. Confronted then with three letters written in his own hand upon the hotel stationery, he owned he had lied. The quality of these documents is exhibited by the following excerpt: 'Do you know how many guys are pinched just for conversation. Why do you make me write like this. I don't want to hurt you. Again I want to know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that away. So *Cherry* you are *making* me do this that I don't want all for $200 dollars. I just want to remind you *years* don't mean anything to me.' (The emphasis was first hand.)

"The trial judge refused to receive these letters in evidence. Here again there is need to remember how the case for the People hangs on the credibility of Bernstein as a witness. Once more there is need also to keep in mind the theory of the People that at the hotel Bernstein was never free to consort with others in respect of his role upon this trial. In both aspects, these letters were proximately relevant evidence on the side of the defendants. We think the text thereof should have been put before the jury. (See *People* v. *Becker*, 210 N. Y. 284, 298.)

"After Rosen had been killed but before the trial of the present case, Bernstein was a prosecution witness on a trial held at Monticello, Sullivan County. On that trial, he tried to swear away the life of one Gangy Cohen who was there accused of another murder.

It was shown, however, that in December, 1937, when Rubin would have implicated Buchalter if he could (R. 2400-01), as he had already implicated him in other crimes, he had made a statement to Mr. McCarthy (then an Assistant District Attorney of Kings County), who questioned him about the crime, in the presence of Mr. Hogan (then an Assistant District Attorney, and now District Attorney of New York County), in which Rubin completely exculpated Buchalter of any complicity in the Rosen murder.*

As regards his former testimony in the *Cohen* case, Bernstein was examined on the present trial as follows: 'Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong. Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong. * * * Q. Were you asked these questions and did you give these answers? A. My mind is very clear. Go ahead. * * * *"Question:* And you had nothing to do with any murder on any occasion? *Answer:* That is right." Q. Were you asked that question and did you give that answer? A. Yes, sir.'

"It was manifestly the duty of the trial judge to warn the jury specifically of the necessity of wariness on their part in consequence of this confession by Bernstein that where another life depended on his oath he had corruptly suppressed his participation in the murder here ascribed by him to two of these defendants. (Cf. *Dunn* v. *People*, 29 N. Y. 523.) The judge said: 'The answer given to the question you have just read in the other trial could be viewed as being meant to be true if the witness considered it referred to the actual shooting. It would be untrue in relation to his being a principal under section 2 of the Penal Law, in the other ways than killing.' This animadversion was very much in the nature of a charge to the jury. (*People* v. *Wood*, 126 N. Y. 249, 260.) In our judgment, the exception taken thereto is valid."

* To quote the dissenting opinion below (R. 4088-89): "When counsel for Buchalter requested that the jury be directed to take notice of Rubin's contradictory statement to Mr. McCarthy, the trial judge said: 'On the second point of that request, he (Rubin) did not testify before McCarthy at all. He was not under oath. That is not perjury. That is a contradiction and he has explained it. He says he had been shot through the head because of testifying before the Dewey grand jury, and he was afraid to give McCarthy any information about the *Rosen* case. I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before Mr. McCarthy. If

Berger, a confessed participant in numerous crimes of violence, was held on his own story to have been an accom-

---

it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction, admittedly so before McCarthy, really amounts to anything at all. He was under no obligation to give any evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory.' This argument in support of Rubin's credibility was inadmissible. Evidence of a prior self-contradiction by a witness, 'is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief.' (Shaw, C. J., in *Commonwealth* v. *Starkweather*, 10 Cush. (Mass.) 59, 60.) Hence the fact that Rubin had not sworn to his contradictory statement to Mr. McCarthy was immaterial. (3 Wigmore on Evidence (3rd ed.), § 1044, p. 727.)

"Rubin's testimony was offered to show the alleged motive for this crime,—fear lest Rosen vent a business grievance by instigating criminal prosecution of Buchalter. To the same end, members of the family of Rosen endeavored by their testimony to show his prominence in the commercial field in which Buchalter was active in labor affairs; but the trial judge struck out that testimony as being 'too sketchy to have any value as evidence.' As a result there was no contradiction of witnesses for Buchalter who testified to the indifference of Rosen's success as a man of business. In that state of the case, Buchalter at least was entitled to have the jury consider whether he was right in his claim of the absence of any compelling reason why he should have been greatly afraid of the enmity of so inconspicuous a person as Rosen. (*People* v. *Becker*, 215 N. Y. 126, 135.)

"On this issue, the trial Judge in his charge said to the jury: 'So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities.' But the next phrase of the judge was this: 'That is enough as motive evidence, if you find these facts to be established to your satisfaction, reasonably.' The judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again, there should have been a presentation of both sides of the issue,—and the question of the weight of the evidence also should have been submitted to the jury."

plice in the Rosen murder. He testified that late in the afternoon of September 11, 1936—two days before the murder—he was instructed by Rubin to call at Buchalter's office at 200 Fifth Avenue, New York City (R. 1804). He went there, and then with Buchalter went to see Weiss.

His story was that he received instructions to point Rosen out to Weiss. He and Weiss went to Brooklyn late that evening. From the testimony of both Rubin and Berger it appears that Buchalter's alleged decision to have Rosen killed was not made until after 5 o'clock in the afternoon of September 11, 1936.

This is in conflict with Bernstein's testimony. Bernstein had fixed the time when he saw Weiss in Brooklyn (R. 1165) at not later than 1 o'clock that same afternoon (R. 1160-61), and said it was then that the order had been given to him to steal the murder car (R. 1166-67). The manner in which the Trial Judge dealt with this conflict in the "time table" is discussed in the Argument, *infra*, pp. 67-69.

Tannenbaum and Magoon were "corroborators". (Cf. *People* v. *Nitzberg*, 289 N. Y. 523.)

Tannenbaum, a confessed professional murderer who led a life of crime since youth, said that he had been present in the office at 200 Fifth Avenue, New York City, where he had heard Buchalter talk with Rubin on September 11, 1936, and again when he heard Weiss report the murder on September 14 or 15.

Records of the New York City Police Department containing reports made by police officers who had Buchalter under constant surveillance during the time in question (as well as long prior and long subsequent thereto) were of material importance to the defense to refute the stories told by Tannenbaum, Berger and Rubin. These reports were subpoenaed by the defendants, were brought to court and were withheld by the prosecutor. The Trial Judge refused to permit defense counsel to see them; he refused to look at them himself or even to have them counted (R. 2148-54). The effect of the suppression of this evidence is discussed in the Argument, *infra*, pp. 54-59.

Magoon's contribution to the People's case was his testimony that, in April, 1939, two and a half years after the murder, Capone had said to him: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." It was held that this statement could be taken as corroborative evidence tending to connect Capone with the crime charged.*

The dissenting Judges below said (R. 4083): "Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin." Magoon was a professional auto thief, who participated in several murders.

In respect of all these witnesses the Chief Judge of the Court of Appeals said (R. 4070-71):

> "* * * in any discussion of the questions presented upon this appeal we should bear in mind that all the essential facts which the People claim demonstrate beyond reasonable doubt the guilt of these defendants are proven, if at all, only by the testimony of degraded criminals whose credibility is impeached, if not completely destroyed, by a cross-examination in which they admitted a callous disregard of every law, human and divine—including the provisions of both the penal law and of the divine commands against bearing false witness against their neighbors."

Our purpose is not to argue about the weight or the character of the evidence adduced, or even to demonstrate how justified was the reasonable doubt of guilt entertained by a majority of the Court of Appeals, and the belief of one of the Judges of that Court that there was not enough to have warranted submission of the case to the jury.

Petitioners would have been convicted on practically no proof; they were for all practical purposes convicted before the trial began, because of the propaganda, the atmosphere in the courtroom, and the composition of the jury. All that was done at the so-called trial was directed to the single end that by no possible chance might the jury be

* This statement is discussed in the supplemental brief of petitioner Capone.

diverted from a predestined verdict of guilt. To judge this, the totality of the proceedings below must be viewed in perspective.

The Propaganda

In advance of the arraignment, a newspaper campaign began with lurid stories that the prosecutor had visited petitioner Buchalter in the Federal Penitentiary, with details (all false) of Buchalter bargaining for his life to escape the consequences of this crime, of which, of course, it was taken for granted he was guilty.

Calculated to condition the collective mind of the community was the conduct of the first arraignment of Buchalter, at which the court room resembled an armed camp (V. 2-3).* The Court (not the Trial Judge) was moved to protest at the manifest impropriety—yet in that very protest gave expression to the common, induced belief that Buchalter was a bad and dangerous man who required closest guard. What purpose other than to fan the flames can be ascribed to the speech of the prosecutor on the adjourned date of the arraignment (V. 6), and again at the final arraignment (V. 9-10), for surely those remarks were not germane to the proper conduct of the proceedings.

Part of the Record in this Court is the compilation in photostat form of some small part of the newspaper stories which preceded, accompanied and followed each step along the path of this case up to and during the selection of the jury.

Some few examples are given to indicate their tenor.

As early as October, 1940, there appeared in a newspaper a story which said in part (R. 87):

> "But now Lepke faces the electric chair as a result of the smashing of Murder, Inc. by District Attorney William O'Dwyer of Brooklyn."

* N. B.—The designation "V." is used to distinguish pages in Vol. VI through VIII, from pages in the preceding volumes, which are designated "R."

Another portion of the story (R. 89) quotes Mr. O'Dwyer as exclaiming "jubilantly":

> "At last I've got Lepke and Capone on their way to the chair."

In November, 1940, there was a statement in a newspaper (R. 90) that Buchalter was officially reported "last night to be ready to buy his life by revealing to District Attorney O'Dwyer of Brooklyn all that he knows about the underworld".

On May 16, 1941, the day Buchalter was arraigned, the *New York World-Telegram* carried this story:

> "LEPKE WOULD TELL OF U. S. CRIME RING.
> Official, Labor Chief Might
> Be Implicated.
>
> Louis (Lepke) Buchalter is negotiating to turn informer and betray the inmost secrets of the magnates of crime who dominate the rackets of America, the World-Telegram learned today.
>
> This newspaper learned that squealers have informed District Attorney William O'Dwyer that Lepke was in a position to deliver a nationally prominent labor leader on a murder charge, a noted public official of New York City on a conspiracy charge, and a close relative of a very high federal office holder as a front man for at least two of the six men credited with controlling racketeering throughout the United States.
>
> Before he was laid by the heels on a federal dope ring conviction Lepke was one of the most powerful racketeers in the country, a member of the highest council of the rackets industry. And if Lepke really talks, the lid's off the underworld.
>
> The status of the negotiations remained a closely guarded secret today, but the World-Telegram learned that already there have been a series of conferences between representatives of District Attorney William O'Dwyer of Brooklyn and Lepke's relatives and attorneys.
>
> Lepke's price is freedom from prosecution on the murder charge he now faces in the Murder, Inc., debacle in Brooklyn and commutation of the 30-to-60-

year sentence hanging over him for extortion in the flour-trucking industry in Manhattan, the World-Telegram is informed.

If he got his price Lepke would be a free man when he finished his federal term at Leavenworth. He will be eligible for parole from Leavenworth in about nine years.

Calls Price Too High.

However, District Attorney O'Dwyer is understood to feel that Lepke's price is too high. It is understood that it has been suggested to his representatives that the best deal Lepke could hope to get would allow him to plead guilty to murder in the second degree in the Brooklyn case and serve the 20-to-life term on his plea concurrently with the 30-to-60-year term in the flour-trucking racket. This would make Lepke eligible for parole in about 17 years. He is now about 43" (R. 83-4).

The *Mirror* and the *News* carried the same story the next day.

Thus the prosecutor's office, on the very eve of the date originally set for trial, was said to have claimed that Buchalter had confessed to the prosecutor his guilt of this murder, and was willing to implicate high City and Government officials in an effort to avoid the punishment of death which, according to all the newspapers, he acknowledged was his own due.

In an affidavit filed on behalf of Buchalter it was said (R. 86-7) that it was the fact (which the District Attorney should acknowledge) that neither he nor his representatives had ever conferred with the District Attorney or anyone connected with the District Attorney; that the reported conversations never took place; that Buchalter had never acknowledged guilt; that he had never attempted to bargain with the District Attorney. This was not denied or disputed by the prosecutor.

This atmosphere of hostility was intensified and made a matter of even greater public interest when the District Attorney was acclaimed as a likely candidate for the office

of Mayor of the City of New York. According to the *Daily Mirror* of July 10, 1941 (R. 91):

> "One reason given yesterday for O'Dwyer's first place position is that he 'seems to be the only man who could beat LaGuardia'. The Brooklyn prosecutor is expected to strengthen his candidacy further by a successful prosecution of Louis (Lepke) Buchalter, due to go on trial Aug. 4 for the murder of Joseph Rosen, ex-member of the Murder Syndicate, 'erased' as an informer."

These, and statements of similar import, continued to fill the public prints.

In July, 1941, applications had been made by petitioners for a change of venue (R. 76-109). Their counsel had prognosticated that a fair trial could not be had in that community. These motions were denied (R. 165-167). The Court said: "It is inconceivable that in a cosmopolitan community such as Kings County, with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence." The Court also expressed the opinion that the publicity was so widespread that Kings County was not likely to be more prejudiced than anywhere else.

The case came on for trial on August 4, 1941 (R. 178-179). Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (V. 31). As the Trial Court then said: "This jury situation is unprecedented. It is practically a run-out" (V. 44). He attributed the reluctance of jurors to serve to the hot weather, but subsequent events support the inference that this was not the reason. The case was adjourned until September 15th, when the trial commenced.

In the interim, however, on August 25, 1941, the New York *Daily Mirror* began the publication of a vicious series of articles, *restricted in distribution to Kings County.* These articles were published every day thereafter, and continued for some time even after the trial commenced and while the jury was being selected. (These articles are

referred to at R. 159, and are included in the sheaf of photostats submitted to this Court as part of the Record.) The following caption and preface of the first article is merely indicative of their lurid tenor:

> "MURDER INC. EXPIRES AS LEPKE GOES ON TRIAL
>
> Today, Arthur Mefford presents the first instalment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.,' the Brooklyn killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail:"

On September 8, 1941, a new application for change of venue was made, based largely on these articles (R. 155-174). It was denied, without opinion (R. 175-176).

The Jury

It is not surprising that the impaneling of a jury was made difficult by such publications.

The unprecedented flow of inflammatory and prejudicial newspaper publicity, before the trial and during the selection of the jury, conditioned the community to believe that the petitioners were guilty. This resulted in a panel so infected with the virus of prejudice, that it was impossible to obtain a fair and impartial trial, as can be found conclusively from a cursory reading of the *voir dire* examinations of the talesmen. Seldom—if ever—could there be found such unanimity of expressions of prejudice in advance of a trial as was voiced by the talesmen drawn from every part of the community.

This prejudice was played upon, and advantage taken of, the newspaper "build up" which, even if not induced or engendered by the prosecutor, was not denounced or

deplored by him. The prosecutor having successfully opposed a change of venue and having a Trial Judge who expressed himself as powerless to prevent this propaganda (although the simple expedient of a change of venue would have afforded a solution), no device was overlooked to obtain the benefit of its full effect upon the jury which had been exposed to its insidious and prejudicial force.

With the trial proceeding in the County of Kings, full use was made by the prosecutor of the newspaper stories, which had alleged the association of one or more of these petitioners with various notorious characters, by asking talesmen and witnesses about acquaintance with such mouth-filling names as, e.g. (R. 2925 et seq.), "Charlie the Bug", "Toots Feinstein", "Shimmy Salles", "Yeggy Feinberg", "Joe Strawberry", "Dimples Wilensky", "Cuppy", "Wolfie Goldis", "Dutch Schultz", for the implications to be derived therefrom, without any evidence of their connection with the case.

Between the 15th of September and the 24th of that month, 24 veniremen were examined. Of them, 3 had been excused because of acquaintanceship with the District Attorney or his associates; one had said he would not accept accomplice testimony. Only one juror had been accepted as satisfactory to both sides. Of the remaining 19, 14 had derived some impression from reading the newspapers. Of these, 10 had formed an impression adverse to the defendants, and of these 10, 2 had formed an impression that they were guilty.

Little wonder that the Court stated at the beginning of the afternoon session on September 24th (V. 460):

> "You are requested not to talk about the case. Let nobody talk to you about it. Please read nothing, especially The Mirror. Those Mirror articles which are still being published seem to be *raising havoc with the jurors in this case*, and there is no way of the court stopping them under the law." (Italics supplied.)

Even the Court was influenced by statements which had appeared in the newspapers. The record shows that after

a talesman, Protter, had been examined, the Court called attention to the fact that Protter's brother was chairman of a committee which had investigated the murder of one Peter Panto. He said that it was possible that the murder of Peter Panto might at some time during the course of the trial be in some way connected or involved (V. 722). His statement was (V. 723):

> "The Court: The Court got its information from the newspapers, particularly the Brooklyn *Daily Eagle* publication, following the examination of this talesman."

Mr. Turkus, the prosecutor, remarked (V. 724):

> "Before you bring in the talesmen may I say that there was a newspaper article, and the newspapers have been replete with conferences with Marcy Protter and a certain group had with the District Attorney in connection with the Peter Panto case. As a matter of fact, in a newspaper which was printed over recess there was a statement made that it was divulged by the District Attorney, Mr. O'Dwyer, in proceeding with the Panto investigation, that the defendant Weiss was implicated in the slaying of Peter Panto. *That was in the press over recess.* There have been many such articles. There were many articles in the press too, prior to this case, in connection with the alleged participation of the defendant Weiss in the Peter Panto killing. Now, this prospective talesman said that the reason——" (Italics supplied.)

The prosecuting attorney interposed a challenge to Protter both because of his residence and on the ground of bias and was sustained on the latter ground. Defense counsel objected, and moved for a mistrial (V. 725):

> "Mr. Talley: In view of the fact that the defendant Weiss was brought into this matter by the Assistant District Attorney two or three days ago, the defendant Weiss in connection with the Panto case, I want to note a further exception to your Honor's reference to that case as being extremely prejudicial to the defendant Weiss. The same newspaper that printed this story

last week will have ample opportunity to print the story of your Honor's reference to the Panto case in connection with this talesman. I want it noted, in view of the fact that I am appearing for Weiss, that the exception which has already been expressed to your Honor's remarks likewise be joined in by me."

• • • • • • •

"Mr. Rosenthal: In behalf of the defendant Capone, in view of this discussion which has been now engaged in, in view of the District Attorney's statement of what is alleged in the newspapers to have been divulged by Mr. O'Dwyer's office to the newspapers, and in view of your Honor's statement, I now ask for a mistrial in so far as the defendant Capone is concerned. And I renew my motion for a severance, which was heretofore made."

The Record shows that Protter would have made a fair and impartial juror (see *infra*, pp. 22-23).

As an indication of the temper of the community, the sworn statement of Mr. Stevens, the first juror to be accepted, and who actually served, is most significant. The record shows (V. 369-370):

"By Mr. Climenko.

"Q. Mr. Stevens, did any of your office associates attempt to prejudice you against any defendant in this case? A. I would not say they attempted to prejudice. The remarks they started to make, if I had interpreted them as such, might have prejudiced me; in other words, if I had accepted what they were saying as facts and absorbed them as such, I could have possibly been prejudiced.

• • • • • • •

"Q. The statements that you heard under those circumstances were prejudicial against that particular defendant; is that correct? A. That is correct, yes."

He said further (V. 387):

"My feeling is this: that frankly I would rather not serve on this jury, but if I am called upon to serve, it seems to me such a terrific responsibility that I can't understand why people who——

"Q. Who know nothing about it? A. Can attempt to influence a man who might have to make such a grave decision."

The record discloses that the Trial Court, instead of being careful to mitigate petitioners' obvious predicament, took the opposite course, and added to the almost insurmountable obstacle in the path of a fair trial by his rulings on challenges for bias. These rulings extinguished whatever chance petitioners may possibly have had of an impartial consideration of the evidence.

The Trial Judge in his zeal to force the selection of a jury under these adverse conditions, became impatient with and critical of both jurors and defense counsel.

When, for example, the prospective juror Samuel Cone honestly testified (V. 328-330) that he would not accept testimony of an accomplice even if it were corroborated, the Court, dismissing him, said (V. 330): "I am sustaining the objection because I don't think the man is mentally fit to sit on a jury." Joseph O. Herrick, another juror, testified that he was acquainted with the prosecutor Mr. Turkus and that his honest opinion was that this might prejudice him because of his belief in that gentleman's integrity. The Court said (V. 406): "I sustain the challenge, upon the ground that the man is wholly unfit to have a job as a juror. Get out." When defense counsel attempted to object to this strictures, the Court said (V. 406): "Sit down please. This gentleman will leave at once and there will be perfect order until he gets out of this room."

It requires little imagination to recognize the effect of the Court's language upon the remaining prospective jurors. No man likes to be told in a public tribunal that the expression of an honest opinion is a sign of mental unfitness. Nor is it. Objection was made by counsel, who said (V. 406-407):

"I wish to have the record show that I object on behalf of all counsel to your Honor's statement to the talesman who has just been excused, upon the ground

> that it has a tendency to prevent a fair expression of opinion on the part of talesmen, and it will be difficult, and I think it makes it difficult for us, to get the fair and impartial jury that we are seeking."

Not only did the Court become impatient with the talesmen, but he rebuked defense counsel for exercising their legal right of peremptory challenge. The Court said (V. 959-960):

> "We are going to work late. I am not prepared to say how late. That depends upon future conduct. If capricious conduct in peremptory challenges is indulged in on either side it will have a bearing upon the length of time in which the Court will work."
>
> "By the ardency of the protest just rendered by defense counsel, the Court is prompted to say something it had not intended to say, and that is, that this morning has been wasted by the excusing of two obviously competent and unbiased jurors. The Court, in its opinion, views these as capricious exercise of peremptory challenges.
>
> "Mr. Climenko: To which remarks the defense takes exception.
>
> "The Court: Which will do you no good whatever, either now or at any time."

When counsel objected to the observations of the Court in respect of a juryman's alleged answer to a question, he was unjustly accused of "fighting back with the Court on rulings" (V. 864) and was admonished by the Court to proceed expeditiously, as time was being wasted and "it is becoming a public scandal" (V. 864).

Obviously, these comments were so worded as to place upon the defense the onus for deliberately delaying the process of the selection of the jury, which was actually caused by the prejudice in the community. At every opportunity the Court accused the defense of wasting time and indulging in dilatory tactics (e. g., V. 847, 1066, 864, 959-960). Although the Court was prompt to accuse the defense of delaying the selection of the jury, a cursory reading of the record will demonstrate how much time was

consumed by the Trial Court in asking irrelevant questions of almost every talesman called for examination (e. g., V. 926-927, 929, 778, 779-780, 697, 729).

At the commencement of the trial, the panel consisted of 250 talesmen. It was found necessary to draw a panel of an additional 100 talesmen, which was practically exhausted by the time the jury was finally selected. A number of these talesmen were excused by the Court because of expressed prejudice against petitioners. Peremptory challenges had to be exercised by the defense directed to talesmen who, although they denied that they had formed an opinion, nevertheless disclosed that they had read newspaper items about the case, or the series of articles which appeared in the New York *Mirror*.*

A "special jury" was ordered drawn for this case. To this no objection was interposed by petitioners. That failure to object has been held by the Court of Appeals to have constituted a consent to waive appellate review of the rulings of the Trial Court upon challenges for actual bias. As a result, petitioners were deprived of any consideration of those factors which made impossible the selection of a fair and impartial jury. The New York Court of Appeals has thus held that New York State provides no corrective process in the case of a "special jury" even though tainted with actual bias. (That subject is discussed in the Argument, II, *infra*.) Talesman after talesman asserted that so strong an opinion had been formed from newspaper reading that it could not be put aside. This was no "special jury" at all within the meaning of the statute. This jury was selected only after repeated efforts of the Trial Judge to induce talesmen to abjure prejudice whether or not actually entertained. It is certainly a matter of fair doubt that any informed resident of Kings County was entirely free of at least a subconscious prejudice in this case by reason of the unprecedented propaganda

* E. g., Talesmen Pape (V. 99, 108), Camachi (V. 338, 356), Ryder (V. 1065, 1075, 1083), Butler (V. 1429-1431, 1437-1438), Robert (V. 1776).

Against this background must be viewed the action of the Trial Judge on challenges for cause, which will be subdivided as follows:

(a) Overruling defense challenges for cause;

(b) Sustaining prosecution challenges for cause, where none existed; and

(c) Seating a juror who was challenged for cause after defense had exhausted all their peremptory challenges.

(a)

Defense challenges overruled

The talesmen John R. Hamilton (V. 162, 175, 177), Samuel F. Strongin (V. 679, 681, 684-685), James F. Nagle (V. 844-846), Edward Groden (V. 878-879, 881), Paul S. Batterson (V. 946, 948), John J. Rose (V. 1014, 1012-1013, 1018), Joseph J. Flanagan (V. 1411-1413), Clement S. Jacobus (V. 1834-1837) and John J. Dunphy (V. 1840-1841) stated, upon examination: that they were prejudiced against one particular defendant or the group with which he was reputed to have been associated; that this prejudice was created by radio reports and the reading of newspapers since being called to serve as jurors;* that this prejudice would either remain during the hearing and consideration of the evidence in the case and could not be removed, or that it would require an effort to disregard it; and that the prejudice could only be removed or dissipated by the introduction of proof by the defendants or someone on their behalf, or that because of it less proof would be required from the prosecution in order to convict.** These

* The Trial Court had admonished the talesmen not to read any newspaper items relative to the case. Nevertheless, some of the talesmen continued to read a series of articles which appeared in the Daily Mirror (V. 1258, 1261-1266, 1026-1029).

** A detailed analysis of the examination on *voir dire* of these talesmen may be found in the Petition on behalf of Capone, pp. 66-93.

latter expressions gain significance when it is realized that they were made by the talesmen with the knowledge that a defendant need not prove his innocence, and that no unfavorable inference may be drawn from his failure to testify (e. g., V. 158, 164, 175; 681; 848, 854-855; 876, 880; 937, 944).

The refusal to sustain the challenge in Groden's case is startling since he said that he worked for and was a "booster" of William O'Dwyer, the District Attorney, and that he was positive that O'Dwyer's office would not bring about an indictment unless they were sure (V. 877-878); Strongin stated that he lived near what he called the "hang-out" of the so-called combination and that he was prejudiced against those individuals, among whom was included Strauss, a co-defendant who had been executed (V. 683-684, 670-671); and Koehler stated that he knew "Buggsy" Goldstein, a notorious character who had been executed and with whom an attempt was made to link the defendant Capone (V. 1616-1617).

Though these rulings manifestly made more difficult defense efforts to obtain an unbiased jury, the gravity of the prejudice instinct therein is accentuated when comparison is made with the rulings on challenges for cause by the prosecution.

(b)

Prosecution challenges sustained

Benjamin Protter had lived in France until the early part of 1939 (V. 619, 651); he knew none of the numerous names mentioned as being connected with the case (V. 652, 645, 620, 621, 640, 624, 622-623, cf. 637); and his state of mind was such that he could be a fair and impartial juror (V. 728, 626-627, 631). He was tentatively selected as a juror, but on the following day a challenge by the prosecution was sustained, at which time the Court and prosecutor made detailed statements concerning the alleged activities of the talesman's brother, an attorney, in the investigation of the murder of one Peter Panto, involving the Brooklyn waterfront (V. 722-724). The tales-

man testified under oath that he had never heard of the name Peter Panto (V. 631); that he did not even know whether his brother ever had a criminal case (V. 638, 621, 653), or whether he represented any waterfront interests; and that, in fact, he had been only distantly friendly with his brother, had political differences with him, and that the usual cordiality existing between brothers was lacking (V. 726-727, 621, 632, 631, 652, 638). Nevertheless, the prosecution's challenge for cause was sustained (V. 728).

Walter C. Petterson was excused upon a challenge by the prosecution (V. 1149, 1151) for the reason that he stated that it "would be hard for me to believe the testimony of a confessed accomplice" (V. 1147), despite his assurance that he would follow the instructions of the Court as to the weight to be given an accomplice's testimony and as to corroboration thereof (V. 1150, 1149). Even though the talesman's reply was a correct statement of the law—that an accomplice's testimony should be viewed with suspicion and caution (*People* v. *Kress*, 284 N. Y. 452, 459)—the prosecution's challenge was sustained. This ruling should be compared with that which relates to the talesman Nagle, where a defense challenge for cause was overruled (V. 868) though he had said that he would accept "very reluctantly" the instructions of the Court that corroboration of accomplice testimony was required to convict and that no inference of guilt could be drawn from a defendant's failure to take the stand (V. 841, 855).

Samuel Silfen was excused upon the prosecution's challenge (V. 1157, 1160). He stated that the *name* Buchalter was familiar to him as that of a dentist *whom he did not know personally*, but whom his mother-in-law visited (V. 1156). The relationship between his mother-in-law and this dentist was solely that of dentist and patient (V. 1156). Beyond that, neither his mother-in-law nor he knew anything more about this dentist. Nevertheless, the prosecution's challenge was sustained. This ruling should be compared with the ruling on the defense challenge to the talesman Groden (*supra*, pp. 21-22).

Benjamin Cohn was excused upon a prosecution challenge for cause (V. 1645, 1648) when he stated that he had heard of the name of Martin "Buggsy" Goldstein and the name of Gesule Capone, which was no more than a name to him (V. 1642). He also stated that he was not particularly in favor of capital punishment, but said that regardless of his feelings, he would follow the instructions of the Court (V. 1646, 1644-1648).

Harry Rosenblatt was also excused on a prosecution challenge (V. 1748, 1747) when he stated that about eight years previously, while with a group of friends at a night club, he was casually introduced to Buchalter; that Buchalter did not make any impression on him; that he was not a member of and did not drink with Buchalter's party; that he was merely introduced and that was all, and that he was not prejudiced (V. 1745-1747). This ruling should also be compared with the Court's ruling as to the talesman Groden (*supra*, pp 21, 22).

Albert Rosenthal (V. 539) was a fellow fraternity member of Mr. Wegman, one of the counsel for the defendant Buchalter, but he had not seen him for a long time (V. 539). He stated that he would not intentionally favor Mr. Wegman; in fact, he might bend over backwards (V. 542, 543). For no discernible reason, the Trial Court accused the talesman of hostility (V. 544). This situation should be compared with that in the case of the O'Dwyer "booster", talesman Groden.

(c)

The last three jurors

The following jurors were impanelled after all peremptory challenges allowed to the defense had been exhausted (V. 1928-1930).

John J. Rorke (V. 1928, 1982, 1918, 1900), a nephew of a police inspector assigned to traffic (V. 1918, 1921-1923), had been called as a talesman in another murder case (People v. Maione and Abbandando) in which counsel for peti-

tioner Capone had appeared for defendant Maione, and Mr. Turkus, the prosecutor here, had appeared for the People (V. 1923, 1919-1920, 1963). Rorke admitted that during his voir dire examination in the earlier case, he had heard mentioned the name of one of the petitioners (presumably Capone) in connection with that of Maione (V. 1929, 1919, 1923-1927); that he had there been peremptorily challenged by defense counsel (V. 1923-1924, 1921, 1922); and that he had followed the developments of that trial in the newspapers to ascertain the outcome (V. 1920). Nevertheless a defense challenge for cause was overruled (V. 1928).*

William C. Links (V. 1959), a radio producer, had also been examined as a talesman in the Maione case (V. 1960-1961). At that time he had stated that he had been called into consultation with reference to a radio program called "Mr. District Attorney" (V. 1960). He had heard the names Maione, Abbandando and Strauss mentioned in that case (V. 1961), and had been excused from the jury by the prosecutor (V. 1961).** He, too, followed the newspapers "to

* Although during the course of his examination, a conference was held at the Bench (which is not reported in the Record, V. 1921), it is significant to note that the prosecutor stood silently by at this challenge, knowing at the time that he would adduce testimony that petitioner Capone was allegedly associated with Maione and Abbandando. When Magoon was on the stand, the prosecutor asked whether he knew Maione, Abbandando, petitioner Capone and numerous other persons. Upon an affirmative reply, the prosecutor further asked whether the named persons were associated and what the name of the association was. Magoon answered that they were; that the association was known as the "Combination" (R. 2423-5). That this testimony would be adduced, counsel for petitioner could not reasonably anticipate, as Maione was in no wise connected with the Rosen case.

** The prosecutor stated (V. 1987, 1960) he had excused Links in the Maione case because he felt that, by reason of Links' connection with the "Mr. District Attorney" radio program, it was not altogether proper that Links serve as a juror. But here, when all the defense peremptory challenges had been exhausted, Links was satisfactory to the prosecution.

The discussion in the footnote concerning Rorke is equally applicable to Links.

find out what became of the case on the last day of the trial" (V. 1961).

John E. Coleman (V. 1983) had read quite extensively about this case in the "World-Telegram" and the "News," but claimed he would be impartial (V. 1987, 1990, 1993). As all defense challenges had been exhausted (V. 1928-1930) the defense rested on the record (V. 1995).

These last three jurors were selected after petitioners had exhausted all of their peremptory challenges. Of the thirty peremptory challenges allowed petitioners collectively, ten were exercised because of the Trial Court's refusal to sustain challenges for cause; eleven because of expressed prejudice against petitioners, with the reservation that it would not interfere with a determination; and one other (Myron Gillespie) who, although he had read all about petitioners and the instant case, and protested that it had left no impression (V. 1295, 1340), nevertheless testified as follows (V. 1341):

> "Q. Well, have you formed an impression with respect to the defendants, irrespective of this case? A. To be honest with you, I find it a tough question to answer." *

Nothing could more clearly demonstrate the prejudice which affected the jurors, even before the first witness was sworn, than the following excerpt from the record relating to Juror No. 9, Mr. Butt, the Vice-President of a Bank (V. 1981-1982):

> "The Court: Before selecting the alternates, of course, the oath will have to be administered to the jury. This question is asked of all twelve members of the jury: Since you were tentatively accepted by

* This talesman insisted he would be impartial (V. 1309-1310) even though he had found a body in the rear of his building which he attributed to "Murder, Inc." (V. 1301), had found the dead body of Mrs. "Legs" Diamond in one of his buildings (V. 1302), and was well acquainted with Mr. Moorehead, the Chief of the Indictment Bureau in the Kings County District Attorney's office (V. 1339-1340).

both sides at the conclusion of your examination, you have been repeatedly cautioned by the Court not to discuss the case, not to let anybody talk to you about it, not to read the newspapers or otherwise read about it, not to listen to the radio about it. I am going to ask each one of you gentlemen individually if you have strictly followed those instructions.

"(Mr. Stevens, Mr. Prentice, Mr. Murphy, Mr. Day, Mr. Gill, Mr. Cummings, Mr. Hall, Mr. Cross, Mr. Butt, Mr. Edghill, and Mr. Rorke each answered individually, 'I have.')

"The Court: Mr. Link, I do not have to ask you; you were only accepted this morning.

"Mr. Rosenthal: May I suggest to the Court that one other question be asked: Has anything happened in any way that would change any of the answers they have given?

"The Court: The question is now: Has anything happened to change your viewpoint in regard to the case in the meantime, to change your attitude as impartial jurors? If so, raise your hand.

"(Juror No. 9, Mr. Butt, raises his hand.)

"The Court: This will have to be at the bench, and not in the hearing of the jury.

"(Counsel for the defense and Mr. Turkus appear before the bench with Mr. Butt.)

(Mr. Butt was questioned by the Court without the hearing of the jury, as follows:)

By the Court.

"Q. What has happened? A. *There has just been a great conviction on my part towards prejudice in this case.*

"Q. Based upon what? A. Based upon the various questions that have been asked in court.

"Q. Nothing outside of the court-room? A. Nothing outside of the court-room, no, sir.

"Q. You know that the questions that are asked jurors or talesmen do not indicate in any way the guilt or innocence of the accused. Are you sure this is not just a design to go back to the savings bank? A. No, sir, it is not. It is more important. I realize it, too. *There has been great prejudice in my mind about the case. All last night I thought about it.* I have not talked about it to anybody.

> "Q. *Do you mean it would prevent you from rendering a fair and impartial verdict?* A. *I am afraid so.*" (Italics supplied.)

Butt was excused.

It is certainly doubtful, then, whether any member of this jury started out entirely free of at least a subconscious prejudice. And there is at least doubt that the exposure to this prejudice did not continue after the trial had begun and while the jury was supposedly segregated and immunized from further such assaults,—cf. R. 3760.

The Physical Trappings of the Trial

The trial then commenced. Petitioners were brought into the court room manacled to police officers. The process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box (R. 766-768). The defendants were seated in court surrounded on all sides by officers. Objection made by counsel for the defense to this procedure was disregarded (R. 764-765). Witnesses for the prosecution, when on the witness stand, were surrounded by police and court officers (R. 764). When defense counsel moved for a mistrial because of this show of force, the Court, in denying the motion, partly described the scene as follows (R. 688-689):

> "The Court: In the court room, behind or at the end of one of the rear corners of the jury box, are two men with badges whom I assume to be detectives. One is against the side window and one is directly in the corner. There are two court officers in their proper places, one directly behind the witness, another one to his left, at the steps. You have your record. It calls for no ruling. Of course, I deny the motion for a mistrial."

It needs no imagination to follow the insidious suggestion to the jury. Rosen was murdered because he threatened

to inform. The witness is now an informer. Because of that the witness must be protected against the individuals on trial.* Therefore the individuals on trial must necessarily have been the murderers of Rosen.

The Conduct of the Trial Judge

Throughout the trial, the Court's constant participation in, and interruptions of, the examination of witnesses and his interpretations of their answers, served to bolster the case for the prosecution and to belittle the defense. Solely as illustrative of this, typical instances are quoted:

The Court more than once came to the rescue of the People's witnesses by endeavoring to excuse flagrant perjury. For example, Tannenbaum had been forced to admit that he had signed and sworn to a false affidavit when charged with murder in Sullivan County, New York (R. 2323-2330). The Trial Judge thereupon interposed a question suggesting that this was justifiable perjury. This is shown by the following excerpt from Tannenbaum's redirect examination (R. 2358):

> "Q. (By the district attorney) At any rate, at the time you entered the plea of not guilty and signed Defendants' Exhibit 2, you were then a defendant resisting conviction on the indictment therein alleged, namely, the killing of one Irving Ashkenas, is that right? A. Yes.
>
> "The Court: You were then fighting to save your own life, is that it?
> "The Witness: Yes, sir."

On other occasions, the Trial Judge made repeated efforts to save the People's witnesses from damaging admissions which would militate against their credibility. A striking illustration appears during the cross-examination of the witness Bernstein when defense counsel inquired into his knowledge that an automobile stolen by him was to be

---

* On one occasion, the prosecutor asked (R. 687): "Is the objection to the protection of the witness?"

used in connection with the murder. He was asked *by the Court* (R. 1181):

> "Q. Then the impression was, if the car was found, it was stolen for the purpose of stripping? A. Yes, sir.
> "Q. And not for the purpose of committing any other crime? A. Yes, sir."

Defense counsel then inquired (R. 1181):

> "Q. What were you trying to conceal, if the car was found, so as to make it look as if it was only for stripping and not for any other purpose?"

Thereupon the Court prevented a response by interrupting and asking (R. 1182):

> "Q. (Interrupting) Just answer the next question yes or no—Did you have a suspicion as to what Strauss wanted the car for?"

Counsel objected, stating (R. 1182):

> "Mr. Rosenthal: I object.
> "The Court: The objection is sustained. I thought you wanted that evidence.
> "Mr. Rosenthal: I don't want words put in the witness' mouth. I wanted him to tell me, not have your Honor ask him a question which would call for yes or no—I want him to tell the jury the reason. I don't want the reason furnished.
> "Mr. Turkus: I object to that.
> "The Court: It does not penetrate the Court's skin. Go ahead."

After some sparring without any responsive answer by the witness, the Court again intervened (R. 1184):

> "*By the Court.*
> "Q. Was that the reason? A. I did not know there was to be a murder or I would never have him take out the radio of the car."

So at last the witness answered the unanswered question in the way the Court intended it should be answered.

On the vitally important issue of the "time table", almost invariably the Court gratuitously protected and bolstered the People's witnesses adversely to the petitioners (R. 1974-1975, 1972-1973, 1964, 1658, 2173, 2179). For instance, during the cross-examination of the People's witness Berger by Mr. Barshay, the following occurred (R. 1974-1975):

"Q. And the best time you can give us is 9:30? A. Between 9:30 and 10. I left that place 9:30, to the best of my recollection.

• • • • • •

"Q. How much time did you spend in Brownsville near the vicinity of Sackman and Livonia, Saratoga and Livonia, and Rosen's candy store, all together?

"Mr. Turkus: I object to it as already answered to the best of his recollection.

"The Court: His testimony shows it is all guesswork.

"Mr. Barshay: He has fixed himself the time as between 9:30 and 10.

"The Court: Pardon me, he has not fixed the time. The Court won't discuss that.

"Q. Mr. Witness, did you say between 9:30 and 10?

"The Court: *I know what he said, but the Court knows it means nothing.*" (Italics supplied.)

"Mr. Barshay: I take an exception to the Court's remarks.

"The Court: Now proceed.

"Mr. Barshay: And I ask for the withdrawal of a juror and the declaration of a mistrial.

"The Court: On what ground?

"Mr. Barshay: On the ground of prejudice, when the Court said that does not mean anything.

"The Court: You mean to have a withdrawal of a juror because the Court will not agree with you that guessing as to time is accurate?

"Mr. Barshay: No, sir, that is not my point.
"The Court: I think it is. Denied.
"Mr. Barshay: Exception, sir." *

The Court constantly accused defendants' counsel of "manufacturing a record" (R. 3870, 3867), of attempting to make a "padded record" (R. 3865), and of being "disorderly" (R. 3869, 3868).

The Conduct of the Prosecutor

The prosecutor must have known that the testimony of the widow and children of the deceased was so fantastic as to be beyond the Trial Court's considerable capacity for credence. Yet they were put before the jury to enhance, by the sympathy which their bereavement naturally induced, the prejudice against petitioners who were accused as the cause of their sorrow. Weeks later, their testimony was stricken from the record (R. 3525-3534), but by that time their appearance on the witness stand had had full effect on the jury.

Time after time officials of the Amalgamated Clothing Workers of America were brought into the court room in the custody of police officials, and placed before the jury to be identified by the witnesses—but to no legitimate purpose whatsoever, for these officials were not contemplated witnesses, were not charged with complicity, and their identity was not in the least in dispute. The real reason? It may have had something to do with the then

* Additional examples similar to the instances just quoted are to be found at R. 2073-2075; 2135-2138; 2170-2171; 2951-2952; 2955; 3229-3230; 2967-2968; 3025-3026; 1883; 654-659; 1209; 2006; 2603; 2131; 1273; 1511; 1512; 1187-1188, 1113-1114. There are many others.

Both Court and prosecutor sought refuge in the magic word "repetitious" to bar the right of proper cross-examination, the Court holding that if the prosecutor had originally asked the question, it would be repetitious to cross-examine the witness thereon and elicit, if possible, a contradictory reply, which would thereby tend to destroy the witness' credibility. The instances are many. A few are referred to: R. 1131-1134; 1139; 1169; 1175; 1176; 1177-1178; 1180; 1194; 1195; 1198-1200; 1201-1202; 1227-1228; 2532; 2586-2589. See, also, pp. 66-67, *infra*.

current campaign of the District Attorney for election as Mayor of the City of New York, or it may have been for the effect upon the jury of seeing that these union officials were apparently in custody.

The prosecutor's summation added fuel to the flames of prejudice and passion. For example:

No one disputed that Joseph Rosen had been murdered; that was at most in issue only technically. Nevertheless there had been paraded before the jury all the gory details; and lest the macabre tale as related by the respectable witnesses—not one of whom connected petitioners with the crime—should lack some horrifying force, the prosecutor dwelt upon it *ad nauseam* in summation, and coupled his review and embellishment with repeated references to the absence of contradiction of these undisputed facts, thus subtly and by indirection commenting on the failure of the defendants to testify.*

To overcome the natural reluctance of a jury to convict on the testimony of witnesses of the stripe of Bernstein, Rubin, Berger, Tannenbaum and Magoon, obviously given to buy absolution for their own crimes, the prosecutor assured the jury (R. 3830):

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valu-

* E.g. (R. 3785-86): "he saw a ghastly sight. There on the floor of this little candy store lay the proprietor, Joseph Rosen, flat on his back, with his arms outstretched, his face, neck and shirt were drenched with blood, pools of blood flowed from the body in the direction of the counter. Scattered newspapers were strewn on the floor. The body was at an angle; he was facing toward the rear; feet facing toward the front and side, legs spread apart. The eyes of the corpse were wide open, staring toward the ceiling. That is paragraph number one. Has that been proven beyond the shadow of doubt? Is there one person in the court room that can deny each and every fact therein stated has been proven?"

able pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

Some further examples of his transgressions of the bounds of fair summation are set forth in the margin.* These were sanctioned and approved by the Trial Judge. The question is whether these were merely "regrettable", as was said by the Chief Judge of the Court of Appeals, or were calculated to deprive petitioners, as was said below by Rippey, J., "of any remote outside chance of any fair consideration by the jury".

---

* R. 3788: Reference to race; R. 3794: Appeal to the court room audience; R. 3802: Charging defense counsel with an effort to confuse and "finagle" the jury; R. 3803-04: Stating that defense counsel were paid with tainted money; asserting his own great integrity and making the issue to be decided by the jury the integrity of the District Attorney, saying that if the defendants are not guilty the District Attorney and his staff should be tarred and feathered, run out of town on a rail and put in jail, and that every lawyer in the court room (necessarily including defense counsel) knew the defendants were guilty; R. 3810: Characterizing one of defense counsel as "the wiliest of lawyers", and insinuating a conspiracy among counsel for these defendants and counsel for other defendants for ulterior purposes; R. 3814-15: Offering his own testimony as to facts; R. 3820: Accusing defense counsel of sabotaging investigation; R. 3821: Injecting again the issue of his own integrity; R. 3828: Denying there had been police surveillance of Buchalter, thus abusing the more emphatically the harm done defendants by the suppression of the police reports (cf. Argument, III, *infra*); R. 3829: Charging defense counsel with desiring to have the witness Bernstein "cut up"; R. 3830: Again injecting the issue of his integrity and the integrity of the Court as assurance that the accomplice witnesses would not receive absolution (as a matter of fact, they later did); R. 3845: Referring to an exhibit not in evidence, and criticizing a private in the army for wearing his uniform; R. 3850: Referring to a prospective juror (not chosen) who had seen Buchalter in a night club; saying that defendants got a fair and impartial trial because "they got an indictment; they got nine lawyers * * *"; R. 3856: Saying no decent man would stand for the defendants; R. 3859-60: Saying it would be monstrous and unthinkable that any verdict other than guilty of murder in the first degree would be returned.

On the motion for a change of venue this prosecutor was quoted (R. 111) as having said: "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation." While he denied so stating, the Record evidences the accuracy of the quotation.

The Court's Charge

The Court's charge capped the climax. It is discussed in the Argument (*infra*, pp. 67-75). The charge was both a condemnation of petitioners and an apologia for the prosecution.

For example: At one point (R. 3903-3904) he let slip the phrase, "When rogues fall out, it is a wise man's delight".*

Referring to the attack upon the credibility of the witness Magoon, who, when he was asked on cross-examination whether he ever lied in his life, replied, "Only little white lies" (R. 2514-2515), the Court said (R. 3898-3899):

> "Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark —it might better be characterized as a fool remark— by one of the witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule, I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule. It must be decided on a basis of reason. I dare say there is not one of us who has not at some time or other made a foolish break which caused him to lose face due to the ridicule of others; but ridicule, gentlemen of the jury, is a childish trait. This case has to be decided by grown-up serious men, who will decide it upon an adequate comprehension of the record. Ridicule is an emotional reaction. It works contrary to reason. It is a bad substitute for reason. It is primeval. That is why I say it is childish. It is something that appeals to and activates the immature mind, but does not and should not affect intelligent men whose minds are mature."

---

* After exception had been taken (in the absence of the jury), the Court, when the jury was recalled, said (R. 3989) that he had not intended to call the defendants names. The damage had already been done.

Specification of the Errors to be Urged

Petitioners urge that error was committed to their manifest prejudice in the proceedings below whereby they were deprived of due process of law in that:

I. The trial was held in a poisoned atmosphere in which a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had. In a situation where the prejudice against petitioners was bound to affect the jurors, the physical trappings of the trial were such as to amplify and vitalize that prejudice.

II. The Court of Appeals should have reviewed the action of the Trial Court which prevented the impanelling of an impartial jury by its rulings upon challenges for actual bias. The right to such review was not waived by petitioners' consent to be tried before a "special jury". The rulings of the Trial Court prevented the impanelling of a fair and impartial jury; and an impartial jury is essential to due process of law. In this case, the State of New York failed to supply a corrective process for this denial of due process.

III. Evidence relevant and material to the defense, in the possession of the prosecution, was suppressed by the State. Petitioners were thus deprived of a fair opportunity to present their defense. They were likewise deprived of an opportunity of adducing proof that evidence offered by the prosecution was in fact perjurious.

IV. The Trial Court's usurpation of the province of the jury by the resolution of issues of fact against petitioners in its charge to the jury as well as by comments during the course of the trial, the attitude of the Court toward the defense throughout the trial, and the summation of the prosecutor wherein, among other unprofessional things,

he made improper promises to the jury concerning the future treatment of confessed criminals who had testified for the prosecution, and wherein he purported to give testimony, all combined to deprive petitioners of the right to fundamental fairness in the trial.

V. Petitioners were not accorded a trial by an impartial judge and an impartial jury; and the State, through the prosecutor, misused its power.

VI. In the case of petitioner Capone, the denial of a severance of the trial. The argument on this subject is contained in the supplemental brief submitted on behalf of that petitioner.

ARGUMENT

*Was the trial so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses?**

Due Process of Law

Although this Court has refrained from defining comprehensively the concept of "due process of law" (*Twining* v. *New Jersey*, 211 U. S. 78), it has uniformly adhered to the minimal standard that the accused must be accorded a fair opportunity to meet the case of the prosecution. *Twining* v. *New Jersey*, 211 U. S. 78; *Tumey* v. *Ohio*, 273 U. S. 510; *Adams* v. *United States*, 317 U. S. 269; *Glasser* v. *United States*, 315 U. S. 60; *Pyle* v. *Kansas*, 317 U. S. (Dec. 7, 1942).

A State is at liberty to prescribe the mode of procedure by which this opportunity to defend will be afforded. *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Hurtado* v. *California*, 110 U. S. 516. It may choose one method in preference to another, despite novelty or departure from

* Dissenting opinion of Rippey, J. (R. 4090).

tradition, so long as the essential requirements are met. Cf. *Palko* v. *Connecticut*, 302 U. S. 319.

Though the method chosen by the State meets the minimal standards, if in the actual administration of the law these criteria are disregarded, the defendant is deprived of his constitutional rights, and a judgment of conviction cannot stand.

In *Brown* v. *Mississippi*, 297 U. S. 278, the Court said (p. 286):

> "• • • The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *Hebert* v. *Louisiana*, 272 U. S. 312, 316."

A primary requisite of due process of law is that the trial be before an unbiased and impartial tribunal. The Judge, it has been said, must have no interest other than the pursuit of justice (*Adams* v. *U. S.*, 317 U. S. 269, 275, citing *Tumey* v. *Ohio*, 273 U. S. 510). The jury must be impartial and competent to afford a fair hearing (*Jordan* v. *Massachusetts*, 225 U. S. 167; *Brown* v. *New Jersey*, 175 U. S. 172; *Hayes* v. *Missouri*, 120 U. S. 68; *Reynolds* v. *United States*, 98 U. S. 145; *Glasser* v. *United States*, 315 U. S. 60, 85-86; *Patton* v. *United States*, 281 U. S. 276).

In *Moore* v. *Dempsey*, 261 U. S. 86, this Court, employing in part the language of *Frank* v. *Mangum*, 237 U. S. 309, stated (261 U. S. 90-91):

> "If in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that 'if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.'"

The minimal requirements of the constitutional guarantee of due process of law are:

(1) A fair and impartial jury, free from influences extraneous to the proof adduced at the trial. This means just what it says; that when the jurors enter the jury box, their minds will not have been prejudiced, surely not poisoned against the defendants. The influence of newspaper articles and the failure of the State to provide remedial process raise the question of due process. Not only this, but the defendants are entitled to a jury that will throughout the trial remain free from improper influences extraneous to the proof. Thus, if the Court is unfair or the State is unfair, if, for instance, the Court prompts witnesses or condones perjury, or decides questions for the jury, or if the State, through the prosecutor, makes improper statements to the jury, deceitfully promises punishment of criminal witnesses, or if both the Court and the State surround the proceedings with a show of force which may affect the jury, all of such things may well tend to subject the jury to improper influences, so that it cannot be said that the defendants are tried by a fair and impartial jury.

(2) An impartial Judge. No contention is made here that this Court should consider mere error as a deprivation of due process of law. However, if errors are so gross, so continuous, so regular and so marked, that the record shows that the Court itself is prejudiced, the result might well be that the defendants have not been accorded due process of law. This may be due to prejudice by the Trial Judge or it may be due to overzealousness, or it may be that the Judge has made up his mind that the defendants are guilty and imposes his views upon the jury. It can hardly be questioned that even though a record seems to be simon-pure, yet, if a Judge had received a bribe, a verdict perforce would be set aside. On the other hand, there may be no bribery; the Judge may honestly have a fixed point of view from the outset and the record may

show this, not because of any error of law into which the Court may fall, but because regularly and from the beginning of the trial, his rulings were such as to show that he was prejudiced. We have already indicated his inconsistent and discriminatory rulings on the challenges to jurors. The dissenting opinion of Judge Loughran* recited facts which show that the Trial Judge practically instructed the jury that it should not pay too much attention to the inconsistencies in the time-table which the defendants claimed upset the prosecution's theory; that the Judge practically told the jury that the prosecution's witnesses had had no chance to collaborate on their stories; that the Judge refused to admit letters of supreme importance on this issue; that he put words in the mouth of witnesses; and that he condoned perjuries. All of these matters will be taken up hereafter. The point we make here is that the record shows that the Judge was not impartial.

(3) Fairness in the use of the State's power. If the State, through the prosecutor, withholds or suppresses evidence, or if it uses unfair means to influence the jury, there has been a denial of due process. The importance of the evidence withheld by the State, with the sanction of the Trial Judge, will be discussed hereafter. Again referring to Judge Loughran's opinion, it appears that the prosecutor made it clear that inferences should be drawn from the failure of the defendants to take the witness stand. The State staged the trial with trappings of power and of armed force, so as to impress the jury with the fact that the defendants were desperadoes; manacles were removed from the defendants in the courtroom and in the presence of the jury; the State surrounded the "informer" witnesses with police officers to protect them, as suggested by the prosecutor, from the defendants. Perhaps more

* The opinion of Judge Loughran was concurred in by Desmond and Rippey, *JJ.*, but the facts he related were confirmed in the opinion of Chief Judge Lehman (R. 4073), who said: "The errors and defects in this case are, it seems to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded."

shocking is the fact that the prosecutor practically bribed the jury by promising them, on his integrity as a prosecutor, that if they would convict the defendants, the State would see to it that the vicious witnesses for the prosecution would get their just desserts.

This would have been bad enough if said in good faith. It becomes utterly abhorrent in view of the fact that these self-confessed murderers were afterwards let off scot free and recompensed.*

It is impossible, when referring to a fair trial, to draw a fine line of demarcation between the functions and acts of the Court, the prosecutor and the jury. Prejudicial conduct by the Court, and improper acts on the part of the District Attorney, sanctioned by the Court, which, in turn, affect the impartiality of the jury, must be taken together. The basic question is whether or not the trial was fair, whether the minimal requirements have been met. In other contexts, this Court has recognized the necessity for consideration of all elements of a situation and has sometimes spoken of a "bundle of rights". Here, it is not amiss to say that there was a *bundle of wrongs.*

As Judge Loughran said (R. 4090): "We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury."

Petitioners submit that they were not "fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power" (*Chambers* v. *Florida*, 309 U. S. 227).

I

The Jury Was Not Impartial

(A) The Jury as Selected

Counsel disclaim any intention of urging that newspaper publicity, as such, caused a denial of due process of

* The official records with respect to these men will be submitted, if permitted by this Court, upon the argument.

law. That publicity may not have been the fault of the State. But when the effects of the newspaper stories reached into the courtroom and tainted the trial proceedings, the State was under an obligation to provide adequate corrective process. It is the failure of the State to provide this corrective process which we urge as the denial of due process.

Because of the damning newspaper articles, petitioners had asked for a change of venue, which was twice denied (*supra*, pp. 13, 14). The failure to grant the motions for change of venue may not in itself furnish the basis of a claim of deprivation of due process. *Barrington* v. *Missouri*, 205 U. S. 483. But the denial of these applications is a part of the record which must be re-lived in order to appreciate the atmosphere in which the petitioners were condemned. Cf. *Johnson* v. *United States*, Frankfurter, *J.*, 317 U. S. (Feb. 15, 1943).

The record on the *voir dire* discloses that even before any evidence had been adduced, the petitioners faced at best an uphill struggle before a jury selected from a panel mentally conditioned to convict. While the jurors said they were unbiased, and swore to act impartially, it is clear that their frame of mind was such that they did not "stand indifferent between the parties." *Coughlin* v. *People*, 144 Ill. 140, 163; *Reynolds* v. *United States*, 98 U. S. 145, 154. Under conditions such as these, events at the trial take on increased importance.

It has been seen that Mr. Stevens, who was sworn and acted as a juror, was faced with the necessity of staving off prejudicial influences. There can be no assurance that, despite his commendable efforts, he was not subconsciously affected, particularly since he still faced the prospect of justifying himself to his co-workers, should he vote for a verdict of acquittal.

Mr. Butt, who was accepted as a juror and then excused, developed a feeling of prejudice even before a word of testimony had been adduced. Whether Mr. Butt was more sensitive than the others who had been tentatively selected,

or whether he had a greater realization of his prejudice than the others cannot, of course, be known. His action demonstrates that there was some taint in the atmosphere of the courtroom.

The Trial Judge gave voice to the "havoc" which the Mirror articles were wreaking in the jury panel. He, himself, acted upon a report which he read in the newspapers about the Panto case and the connection of petitioner Weiss with it. The prosecutor's challenge of Protter, for bias, was sustained not because of anything which occurred in the courtroom, but because of something which the Court had read in a newspaper in the midst of the trial.

Prejudice from without was thus taking its toll in the courtroom. Petitioners' prediction had come true. An impartial jury could not be obtained.

In order that a jury might be selected, the Court overruled challenges for cause which should have been sustained. It was therefore necessary for petitioners to use up their peremptory challenges where challenges for cause should have been sustained. A jury was selected only after the Court had browbeaten talesmen, thereby leading others in the panel to deny prejudice to avoid criticism. The last three jurors put into the jury box would obviously have been challenged peremptorily if the Court had not theretofore forced the defense to exhaust all of their peremptory challenges.

Under these circumstances, it cannot fairly be said that the defendants were tried before a truly impartial jury. One's eyes must be closed to reality to believe that in this milieu it was possible to obtain a jury which stood indifferent between the State and the petitioners.

If the Court itself obtained and was influenced by information from the newspapers, can it be said that the jurors and prospective jurors were entirely free from that influence? Were these petitioners convicted upon proof of the charge laid in the indictment, or upon matters *dehors* the record? Cf. *DeJonge* v. *Oregon*, 299 U. S. 353, 362.

The language of the Court in *Stephens* v. *People*, 38 Mich. 739, 743, is particularly apt in this case:

> "Under such circumstances it is idle to inquire of jurors whether or not they can return just and impartial verdicts; the more clear and positive were their previous impressions of guilt the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has [*sic*]* established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so."

True, the twelve men who took their places in the jury box swore that they would render an impartial verdict and said they would judge fairly between the State and the petitioners. But as the Court said in *Coughlin* v. *People*, 144 Ill. 140, 184:

> "* * * Whatever may be the weight ordinarily due to statements of this character by jurors, their value as evidence is in no small degree impaired in this case by the mode in which they were, in a certain sense, forced from the mouth of the juror. The theory seemed to be, that if a juror could in any way be brought to answer that he could sit as an impartial juror, that declaration of itself rendered him competent. Such a view, if it was entertained, was a total misconception of the law."

Again at page 186:

> "Nor should a defendant be compelled to rely, as his security for the impartiality of the jurors by whom he is to be tried, upon the restraining and controlling influence upon the juror's mind of his oath to render a true verdict according to the law and the evidence. His impartiality should appear before he is permitted to take the oath. If he is not impartial then, his oath cannot be relied upon to make him so. In the terse

* The word "not" seems to have been omitted by the reporter.

> and expressive language of Lord Coke already quoted, the juror should 'stand indifferent as he stands unsworn'."

Petitioners urge that they were deprived of their constitutional guarantees by the failure of the Court to intervene to prevent this travesty upon justice. The spirit which permeated the panel was no different from that of the mob which this Court condemned in *Moore* v. *Dempsey*, 261 U. S. 86. There (p. 91) "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and the State Courts failed to correct the wrong". Here was the same vice, but in more subtle form. Yet the same result—deprivation of due process of law—ensued. Men may, if they are strong-willed and courageous, resist an open show of force. The mob spirit which is engendered in the mind is not so easily repelled, because the individual may have no consciousness of being prejudiced. When the fact of the prevalence of the hostility towards the petitioners became apparent, there was no longer the possibility of a trial by reason. From that moment, the proceedings became a sham.

In *Simon* v. *Craft*, 182 U. S. 427, 436, this Court said:

> "• • • The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form."

Cf. *Avery* v. *Alabama*, 308 U. S. 444, 446; *Powell* v. *Alabama*, 287 U. S. 45, 58.

It is no answer for the State to say that the petitioners were wicked men and had brought upon themselves the hostility of the community. Nor is it an answer to say that the ends of justice can be served only by a speedy trial and a conviction even though in that process the rights of defendants are trampled upon. While speed in the administration of justice is desirable, *fairness* is essential.

As this Court said in *Chambers* v. *Florida*, 309 U. S. 227, at 240:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end."

In *State* v. *Nash*, 7 Iowa, 347; the Court wrote (pp. 371-372):

> "An excited state of public feeling and opinion is always the most unfavorable for the investigation of truth. Not only should the mind of the juror be wholly without bias and prejudice—it should not only be free from all undue feeling and excitement in itself—but it should be, as far as possible, removed from the influence of prejudice and feeling, and excitement in others. A circumstance of small importance in itself, may often, in the midst of a community stirred by passion and excitement, serve to turn the scales of justice."

Petitioners earnestly urge that because of the contamination of the jury before whom they were tried, they were deprived of their right to be heard before an impartial tribunal.

(B) The Physical Trappings

The entire trial was so staged, with the sanction of the Court, as to impress the jury with the idea that petitioners were desperate and violent characters.

Petitioners were brought into the court room manacled to police officers. The process of unshackling took place in the presence of the jury and after the jurors had taken their places in the jury box (R. 766-68). Thus the State manufactured and placed before the jury mute but telling testimony that it considered petitioners to be not men who must be proven guilty, but desperate characters of whose guilt there was no doubt. Objection made by counsel for the defense to this procedure was disregarded.

In his brief in opposition to the petitions for the writ of certiorari, the District Attorney attempted to excuse this procedure by saying (p. 34):

> "* * * It is enough to say, concerning petitioners being manacled to police officers when brought to and from the courtroom, that Buchalter and Weiss were formerly fugitives from justice and at the trial were Federal prisoners in the custody of a United States marshal. They and Capone, as the record shows, were desperate criminals."

The Trial Court, however, gave another reason. It said (R. 767):

> "The Court: These defendants have been brought into this court-room for trial in a court which is not adapted to the trial of criminal cases. They have to be brought through the public corridor down a public staircase and through a door which leads into the Judge's chambers, shocking as this may seem, in order to come into this room. The Court has ruled on this and has said all it is going to say."

Neither reason can justify this prejudicial display before the jury.

Standing alone, the manacling of a defendant in a criminal trial is not necessarily ground for condemnation of the judgment. It may be justified where defendants are violent or disorderly in the proceedings or where they give evidence of an intent to escape during the course of the trial. *State* v. *Rice*, 347 Mo. 812; *State* v. *Kring*, 64 Mo. 591. In this case, where there was not even any intimation of violence or disorderliness by petitioners at the trial, and no indication that they would attempt to escape, this show of force in the presence of the jury must be considered as part of the mosaic which reveals the unfairness of the trial. To use the language of the Court in *State* v. *Kring*, 64 Mo. 591, 593:

> "* * * When the court allows a prisoner to be brought before a jury with his hands chained in irons,

and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of the officers."

It is no excuse that the court room was not adapted to the trial of criminal cases. Part of the concept of due process of law, we submit, is that a State must furnish a seemly place for trial. The appropriate remedy was not this unwarranted exhibition before the jury. At least, the manacles could have been removed before the jury was brought in.

If, on the other hand, the excuse of the District Attorney be considered, the vice of the practice is clearly disclosed. Manifestly, the prosecutor was communicating to the jury the impression that the defendants must be guilty, otherwise they would not be in chains.

Intensifying the spirit of condemnation which the State's officers engendered by all the foregoing, there was likewise the close surrounding of the witnesses by numerous attendants and guards. This condition was graphically described as follows (R. 764-65):

"Mr. Talley: Before I commence to examine this witness, I request your Honor to remove the court officer who stands within six inches behind the chair of the witness. I ask your Honor to remove from the sight of the jury the two detectives who escorted this witness to the witness chair. There is another officer standing, in uniform, immediately alongside of the witness chair. I have no objection to his standing in that general vicinity, but the other display I ask to be removed, as prejudicial to these defendants and interfering with proper cross-examination and prejudicial to the defendants in this court-room. There are plenty of detectives in this court-room and there are other uniformed policemen who are kept outside of the court-room. These three defendants are brought in here, in sight of the jury, in chains, literally in chains. There are three or four officers sitting alongside of these defendants, and I object to this display as unnecessary,

> unprecedented, and here for no other reason than to prejudice the jury against these defendants. I ask that they be removed, and that we proceed in a legal, judicial manner in the conduct of this trial from now on, and that we take away this theatrical display."

This request was denied (R. 766).

Considered in the light of all of the proceedings at the trial, these matters cannot be disregarded. Even if the jury entered upon its duties conscientiously intending to be impartial, the insidious influence of theatrical display must have weighed when the jury came to consider its verdict.

(C) Prejudice Created by Court and Prosecutor

This subject is discussed under IV, *infra*.

II

The Right to an Impartial Jury Was Not Waived

This case presents the further question whether, through inadvertence or indirection, the right to trial by a fair and impartial jury may unwittingly be waived and lost.

(A)

It is an essential part of due process of law in the State of New York that the trial of a capital case must be by jury, and the jury cannot be waived. Article I, Section 2, New York State Constitution*; *People ex rel. Battista* v. *Christian*, 249 N. Y. 314. "Though a state may, apparently, deny an accused person a jury trial entirely, if one is granted, the selection of the jury must be conducted in a manner calculated to secure an impartial body * * *." Natting, *The Supreme Court, The Fourteenth Amendment*

* Appendix, *infra*, p. 80.

and State Criminal Cases, (1935) 3 U. of Chicago Law Review 244, 247-248.

Petitioners sought review of obviously improper rulings by the Trial Court upon challenges for actual bias. But the Court of Appeals in refusing to review said (R. 4121) that because petitioners consented to be tried before a special jury "a majority of this court is of the opinion that he thereby consented also to the statutory provision* that rulings of the trial court upon challenges for actual bias are final and not appealable."

---

* N. Y. State Judiciary Law, § 749aa, subd. 7, Appendix, *infra*, p. 83.

In *Spies* v. *Illinois*, 123 U. S. 131, this Court held that on its face the Illinois statute did not deny due process by providing "that it shall not be a cause of challenge that a juror has read in the newspapers on account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence." But the Court also ruled that a denial of due process under the Fourteenth Amendment could result from "the actual administration of the rule of the statute by the court." At page 170 the Court said:

> "We proceed, then, to a consideration of the grounds of challenge to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated."

The Court then quoted at length these jurors' statements on *voir dire* (pp. 170-179), and concluded (p. 179) that "the question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence." The final decision by this Court was (p. 180) that the trial court's rulings were not "so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime." Clearly this holding demonstrates that even in the face of a similar statute a question of the denial of due process may arise from a trial court's rulings on the qualifications of a talesman.

The District Attorney may in this connection refer to *Hayes* v. *Missouri*, 120 U. S. 68, and *Brown* v. *New Jersey*, 175 U. S. 172. The attack in each of these cases was upon the validity of the statute itself, and it was "not even suggested that the jury by which the accused was tried was not a competent and impartial one" (120 U. S. 68, 71).

Consent to be tried by a special jury cannot be tortured into a consent to be tried by a contaminated jury. The panel was so infected by prejudice and bias that there was little, if any, likelihood of obtaining a fair and impartial jury. If, in this situation, recognized by the Trial Court in his comment that the newspaper articles were "raising havoc with the jurors", it was not his duty to declare a mistrial and permit renewal of the motions for a change of venue, then at the very least he should have allowed the widest scope to the investigation of the state of mind of each juror. Indeed, at the outset he had promised to do so, saying (V. 49):

> "It will be difficult to select a jury in this case. There is no doubt about that. The Court will allow abundant latitude to all counsel to make searching examination of every member of the panel who is drawn, for the purpose of determining whether such member has any prejudice that will prevent a fair and impartial trial of these defendants."

When it became apparent that such examination would inevitably disclose such prejudice on the part of almost every prospective juror, not only did he improperly restrict that examination, but, by his comments and strictures, he virtually bludgeoned the venire into abjuring prejudice and bias in order to qualify.

Where it is charged, as here, that rulings of the Trial Judge prevented the proper examination of the talesmen upon challenges for bias, it is no answer to say that the local statute makes such rulings immune from review. The Fourteenth Amendment's guaranty of due process would be idle words were its purpose so easily circumvented. How otherwise would a defendant be guarded against an admittedly hostile jury?

A fair and impartial tribunal is essential to due process. To say, as is implicit in the decision below, that a consent to trial by special jury carries with it a consent to surrender the right to question the fairness and impartiality of the

jury impanelled, is not consonant with any concept of due process.

A waiver of so fundamental a right can never result from inference or as a consequence of a failure to object to a trial by a "Special Jury". "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser* v. *U. S.*, 315 U. S. 60, 70; *Johnson* v. *Zerbst*, 304 U. S. 458, 464. Any act of the Legislature which prescribed a trial by a jury which was not unbiased and impartial "would be a violation of one of the essential elements of the jury referred to in and secured by the Constitution." *Stokes* v. *People*, 53 N. Y. 164, at 171.

When petitioners' counsel below interposed no objection to trial by special jury, they had a right to assume that every talesman called would be qualified under the statute,* which provides: "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression."

Upon the *voir dire* examination there was conclusive proof that the talesmen summoned for this case did not meet these qualifications. Yet the "majority of" the Court of Appeals has ruled that a provision** of the special jury statute forbids a review of the rulings of the Trial Judge.

In an earlier case that Court, having held that the right of jury trial cannot be waived (*People* v. *Cosmo*, 205 N. Y. 91, at p. 96), said: "It must follow that if the right itself cannot be waived neither can there be a waiver of anything that is essential to the full benefit or protection which the right is designed to safeguard."

An appellate court cannot be precluded by such a statute from a review of the rulings of the Trial Court upon challenges for prejudice, because otherwise there could be no preservation of "the fundamental idea that no man's life

* N. Y. State Judiciary Law, § 749aa, subd. 2, Appendix, *infra*

** *Idem*, subd. 7, Appendix, *infra*.

* * * be forfeited as criminal punishment * * * until there had been a charge * * * fairly tried in a public tribunal free of prejudice, passion, excitement and tyranical power." *Chambers* v. *Florida*, 309 U. S. 227, 236-37. A "properly constituted tribunal" is essential to due process (*Backus* v. *Fort*, 169 U. S. 557, 569) and, where jury trial is required as in New York, there can be no such tribunal unless the jury be impartial.

There can be no doubt that this jury was not properly impanelled, because the rulings upon the challenges for actual bias were clearly erroneous under New York law. *People* v. *McQuade*, 110 N. Y. 284, 293, 294, 301; *People* v. *Casey*, 96 N. Y. 115, 122, 123; *People* v. *Wilmarth*, 156 N. Y. 566, 568. These rulings would have been reviewable but for the "special jury" statute. *People* v. *Crum*, 272 N. Y. 348. Under the authorities just cited, a review must have resulted in a reversal of this conviction.

(B)

On the motion for reargument of the appeal petitioners emphasized (R. 4105-06) the point that the rulings of the Trial Judge deprived petitioners of due process of law, and that the refusal of the Court of Appeals to review those rulings constituted a further denial of due process.

If this were a matter merely of State law, the construction announced by the Court of Appeals on the motion for reargument might be final. *Howard* v. *Fleming*, 191 U. S. 126. But on the elementary principle that State Courts are charged with the duty of protecting rights guaranteed by the Federal Constitution (*Mooney* v. *Holohan*, 294 U. S. 103, 113), the Court of Appeals, despite the statute, should have examined the rulings of the Trial Court on challenges for actual bias to determine whether by such rulings petitioners were deprived of "due process of law".

If the Court of Appeals was by statute barred from considering the rulings of the Trial Court on challenges, and this denial of review was itself no violation of the constitutional rights of petitioners, yet the question of the effect

of such rulings is still one for this Court to consider. The State may, for instance, provide that the judgment of a trial court be final and not subject to appellate review. Nevertheless, on the issue of due process of law, a constitutional question would still exist whether the judge and jury were impartial and whether the trial was fair. No state statute can deprive the defendant of that federal constitutional right and this question persists irrespective of any limitation placed upon the appellate jurisdiction of any state tribunal.

III

Relevant Evidence Was Suppressed

"In the fair administration of the criminal law", where evidence in the possession of the prosecution was not made known to the defense, a "conviction cannot stand" (Opinion of the Court of Criminal Appeal, per Lord Chief Justice Hewart, in the case of *Edward Guerin*, 23 Cohen's Criminal Appeal Cases 39, 43).*

For the prosecution to suppress and to deny a defendant access to evidence is undoubtedly a denial of due process. *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213. That issue is presented by the record in this case.

Tannenbaum testified that on September 11th he had visited petitioner Buchalter at an office in the building at 200 Fifth Avenue, New York City; that there he overheard the conversations between Buchalter and Rubin, to which Rubin had testified, i. e., Buchalter's expression of purpose to have Rosen silenced. Tannenbaum said he was also there when Weiss reported the murder to Buchalter.

---

* In this case the Court held also that a conviction must be reversed where the jury had been apprised of defendant's bad character, even though that disclosure had been made by the defendant's own counsel in consequence of certain newspaper publicity.

Berger said that in response to Buchalter's summons, communicated by Rubin, he went to that office; that he and Buchalter (undisguised) then left the building together, through the lobby and front entrance, and entered a taxicab en route to the meeting with Weiss (R. 1959-60).

During the period when these occurrences were supposed to have taken place, Buchalter was under constant surveillance by police officers of the New York Police Department. Petitioners, during the course of the trial, had served a subpoena on the Police Department to produce the official reports of this surveillance.

At the conclusion of the direct examination of Berger, defense counsel called for these official reports (R. 1880-1883). The prosecutor acknowledged that they had been turned over to him by the Police Department. The Court, however, refused to direct the prosecutor to produce them. Later, the request was renewed (R. 2140-2156), and, although the reports were in court, the Trial Judge, upon the prosecutor's objection, refused to permit defense counsel to examine them, refused to examine them himself or to have them counted, and refused to permit any disclosure whatsoever of their contents.

This point was raised on the original appeal to the Court of Appeals, but no mention of it appears in any of the opinions. It was urged again on the motion for reargument. The *Per Curiam* opinion denying the motion for reargument (R. 4120) stated that the Court had examined these police records, that the surveillance amounted to very little, since it was of the entrance and lobby of the office building, and that Buchalter could and did elude the police at will.

What these reports disclosed, petitioners have no way of knowing. Whether they were complete or not, petitioners cannot know. Berger's testimony, and perhaps that of Tannenbaum and Rubin, may well have been subject to complete destruction or at least impeachment by the results of even such limited surveillance.

The information contained in the police reports, even if it relates only to the lobby and entrance, might have had

probative value from one of two aspects. If, for example, the reports disclose that at about five o'clock on September 11, 1936, Buchalter was at a place other than 200 Fifth Avenue, then clearly Berger's story would be false. This would amount to affirmative contradiction.

If, on the other hand, the reports reveal that police officers were actually stationed at the entrance to 200 Fifth Avenue, and did not see Buchalter emerge from that entrance, or that if he did he was not accompanied by another person, the evidence, while negative, might well have probative force in impeaching Berger's testimony.

Defendants should not have to demonstrate that the suppressed evidence *would* have changed the result; it should be enough that it *might* have. Surely no one can say with certainty that the jury might not have been influenced by the reports of the police officers who were shadowing Buchalter, thereby corroborating the testimony of the defense witness Shapiro.

It is one thing to say, as did the majority below, that certain errors did not have influence. It is a quite different matter to assume that the suppressed evidence would have had no effect.

This Court has said, *Edwards* v. *United States*, 312 U. S. 473, 482:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body."

And in *Saunders* v. *Shaw*, 244 U. S. 317, in answer to a contention that the excluded evidence was of no importance, this Court said at 319:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

Lord Chief Justice Reading for the Court in *The King v. Sagar* (1914) 3 K. B. 1112, said (p. 1115) that excluding evidence admissible in law "prevented the prisoner from putting forward a substantial part of his defense * * *. It is impossible to say * * * that, if the evidence which was wrongly excluded had been admitted, the jury would have come to the same conclusion. Consequently, the conviction must be quashed."

Not only were petitioners deprived of the essential right of cross-examination of the prosecution witnesses, Rubin, Tannenbaum and Berger, in respect of any disparity between the testimony of these witnesses and the reports of the police officers, itself a deprivation of due process of law, but the petitioners were deprived of a fair opportunity to present their defense affirmatively.

It was important to that defense to demonstrate that the stories told by Rubin, Tannenbaum and Berger concerning the visits to Buchalter at 200 Fifth Avenue, New York, were false. For that purpose the defense called the witness Shapiro. In view of the scurrilous attack upon this witness by the cross-examination of the prosecutor, it was important to have the corroboration of his testimony which these police reports might have supplied.* If the reports themselves were inconclusive, they would at least have identified the police officers who conducted the surveillance of Buchalter. These officers might then have been called to testify.

The only corroboration of the accomplices' evidence against Weiss, and the only evidence at all against Buchalter, revolved wholly around the occurrences at 200 Fifth Avenue. With the most cogent proof available in these police records and by the police officers, petitioners were not permitted access to that proof.

In his brief in opposition to the applications for the writs of certiorari, the District Attorney argued that it was not

* And to prevent just such an unwarranted assertion that the police surveillance was a fiction, as in fact was made by the prosecutor in his summation (R. 3828).

error to suppress this evidence because counsel for the defense could not say that the reports *were required* for cross-examination, but could only say that they *might be* (Brief, p. 32). He also urged that the petitioners might have called the Police Commissioner as a witness to reveal the names of the officers who made the reports (Brief, p. 33).

There is no merit to these contentions. Defense counsel, not knowing what the reports contained, could not represent to the Court that they would actually be used. The envelope which was delivered might not even have contained the reports on the surveillance during the critical period. Only the representatives of the State knew what was in those reports. The Trial Judge did not even take the trouble to look at them or let them be counted.

As for calling the Police Commissioner as a witness, the District Attorney should know that this would have been improper. To call a witness, not for the purpose of giving testimony about the facts of the case but merely to reveal the names of other possible witnesses, would have subjected defense counsel to criticism indeed. The reports themselves were in Court and there was no reason why they should not have been made available to the defense. The Trial Judge could have provided safeguards, if any were needed, to prevent information extraneous to the case from being disclosed.

The opportunity to present a defense is of the essence of due process of law. Whether a fair opportunity so to do is afforded the defendant when he is denied access to evidence in the possession of the prosecution, is not a novel question.

The applicable principle has been enunciated in *State v. Wood*, 127 Me. 197, 200; 142 A. 728, 730, where it was said:

> "A trial before a jury is an investigation of matters of fact, its sole purpose being to ascertain the truth. All competent evidence tending toward that result should be produced. It is the plain duty of prosecuting officers to make every effort to present all of the facts and to assist the respondent in his effort to do the same.

> The state is not endeavoring to prove the respondent guilty. It is endeavoring to ascertain whether or not he is guilty. It is not only within the power of the court to take such action as shall tend to bring before it all that may assist in the search for truth but it is its duty to do so. Any other theory of law, any different course of conduct on the part of the court, would cause judicial proceedings to receive and merit the contempt of all right-thinking citizens."

Cooley, *C. J.*, for the Supreme Court of Michigan, in *People* v. *Davis*, 52 Mich. 569, 573-574; 18 N. W. 362, said:

> "• • • the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the State has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called."

See also, *Centeamore* v. *State*, 105 Neb. 452, 455; Cf. *People* v. *Walsh*, 262 N. Y. 140, 150.

In *Curtis* v. *State*, 46 Tenn. 9, 11, the principle was thus enunciated:

> "The duty of the Attorney for the State, is to adduce all the legitimate proof of the prisoner's guilt; but it is not his duty to endeavor to secure a conviction to which he is not entitled under legitimate evidence and fair practice. And if a defendant can not be convicted under this rule, the State has no interest to have him convicted. The Supreme Court of Michigan reversed a criminal case, for the reason that the District Attorney, knowing of evidence which would make in favor of the defendant, did not place it before the jury. Prosecuting officers must discharge their duty to the State, but not resort to strategems to deprive the prisoner of his legal rights."

IV

The Trial Judge Assumed the Role of a Protagonist for the Prosecution; His Conduct and that of the Prosecutor Misled the Jury

(A) *The Prosecutor's Actions*

In addition to the other matters discussed elsewhere in this brief:

(1) In his summation to the jury, the prosecutor said (R. 3830):

> "Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want. Let us use common sense here."

Is it within the power of the State so to impose upon and deceive the jury? In such assurance there was, as the Chief Judge said (R. 4076): "implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts." What purpose was there in this promise other than to induce the jury to accept testimony which otherwise it would have been loathe to credit?

Any individual on the jury might well have rejected the testimony of Bernstein, Rubin, Tannenbaum, Berger and Magoon, who were attempting to purchase absolution from their confessed crimes by implicating or accusing the petitioners. The testimony of these witnesses was particularly suspect because of their vicious records and an inherent lack of plausibility. Testimony obtained for a consideration offends any person's natural sense of justice.

When, therefore, the prosecutor pledged the State's integrity and the integrity of the Court (*the Court sitting silently by*), for the proposition that no such absolution had been or would be granted these witnesses, he was offering an inducement for credence and for a conviction.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba* v. *California*, 314 U. S. 219, 236. Whether true or false, this statement by the prosecutor was fundamentally unfair. The fact is it was false. Each of these witnesses has received his reward for the testimony given. None has paid penance for his admitted crimes.

This Court has held that a conviction obtained by imposition or fraud on the part of the prosecutor cannot stand. *Mooney* v. *Holohan*, 294 U. S. 103. It has been held that conviction on a plea of guilty induced by fraud on the part of the prosecutor constituted a deprivation of due process of law. *Smith* v. *O'Grady*, 312 U. S. 329; *Lyons* v. *Goldstein*, 290 N. Y. 19. The deceptive statement made by this prosecutor in his argument to the jury should not be condoned any more than the presentation of testimony known to be perjured.

(2) The overzealousness thus illustrated was characteristic of the prosecutor's entire address. It was an appeal to the prejudice and passions of the jury, but the Trial Court admonished defense counsel that "There must be no interruption at any time during the summation" (R. 3782). Further, the Trial Court would permit objections to the People's summation only after its conclusion, and then only in the absence of the jury (R. 3782, 3860-3861, 3864, 3868; cf. 3543). In contrast with the Court's instructions that there should be no interruption of the prosecutor (R. 3782), was the Court's previous statement at the beginning of the summations of the defense that there should be no interruption unless "anything of sufficient importance arises that really justifies an interruption of counsel" (R. 3543).

More than one-third of the summation was directed to the fact that a murder had been committed, of which there was no dispute. The real issue was whether petitioners were implicated in that crime. After assuring the jury, at the outset of his summation, that he would take them through his entire opening statement, sentence by sentence, to refresh their recollection and show that every fact had been conclusively proven, the prosecutor then described in gruesome detail the condition of the corpse, the identification of the automobile, one of the murder weapons, and numerous other items peculiarly within the knowledge of the admitted liar Bernstein, but in nowise connected with petitioners except through Bernstein's testimony. At the conclusion of the prosecutor's recital of each of these details, he would interject, "True? • • • Is there a single word in the representation of proof that has not been established beyond a shadow of a doubt?" or words to like effect (R. 3784-3806). Despite the rule in the State of New York that the failure of a defendant to testify may not be the subject of comment (*People* v. *Watson*, 216 N. Y. 565, 568-569), the prosecutor continued by asking (R. 3806):

> "To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?"

Whoever the murderers actually were, or whoever instigated the murder, this merely established Bernstein's complicity in the murder, but did not connect petitioners therewith. Yet the prosecutor, by his argument, created an impression that petitioners' failure to take the stand and deny Bernstein's complicity in the crime was an admission of guilt on their part.*

* The dissenting Judges agreed. "This was a direct violation of the defendants' constitutional rights against self-incrimination" (R. 4086).

Although there is much authority to the contrary, this Court has said that while it is not inherent in the concept of due process of law, immunity from compulsory self-incrimination "should, must, and will be rigidly observed where it is secured by specific constitutional safeguards." *Twining* v. *New Jersey*, 211 U. S. 78, 113. New York does secure that immunity by just such a safeguard. New York State Constitution, Art. I, Sec. 6 (Appendix p. 81, *infra*). This immunity, in New York, includes as an integral part, the right to protection from adverse comment on a defendant's failure to take the stand. *People* v. *Watson*, 216 N. Y. 565, 568-569.

Perhaps, standing alone, invasion of this right is not open to argument here because the decision of the Court of Appeals must be accepted as a final ruling that the law of the State of New York has not been violated. *Patterson* v. *Colorado*, 205 U. S. 454, 459; *Rawlins* v. *Georgia*, 201 U. S. 638, 639; *Burt* v. *Smith*, 203 U. S. 129, 135. But the violation of petitioners' right in this respect is nonetheless a part of the picture of the conduct in this case which, taken as a whole, shows a denial of due process of law.

(3) Without being sworn, and without subjecting himself to contradiction or cross-examination, the prosecutor during summation uttered statements as of fact when there was absolutely no evidence in the record to support them. An example was his attempt to justify the falsehood of Bernstein, who originally denied and subsequently admitted writing letters while confined in a hotel as a material witness (R. 975-976, 1247, 1256, 1259). In an attempt to justify the flagrant falsehood necessarily shown by this conflicting testimony, and although no such excuse was offered by the witness, the prosecutor said (R. 3869):

> "Well, he wrote letters. • • • What is wrong about that? Sholem, this misguided man, wanted to protect some employe in the hotel and he denied it until they brought here the photostatic copies of letters. Then he had to admit it."

It is inherent in our jurisprudence that it is fundamentally unfair to offer evidence against an accused without subjecting such evidence to the test of cross-examination as part of the opportunity to answer the accusation. The right to cross-examine adverse witnesses is what is meant by the constitutional right of an accused to "be confronted with the witnesses against him." Wigmore on Evidence (3rd Ed.), Vol. V, p. 128. New York, by its Constitution, Article I, Section 6 (Appendix, p. 81, *infra*), guarantees that right against statutory or judicial invasion. But this protection availed petitioners nothing; for the prosecutor, in his final word to the jury save for the equally prejudicial instructions of the Trial Judge, was allowed to inject into the case these elements which petitioners were given no opportunity to answer.

(4) The prosecutor put in issue his own integrity and that of the District Attorney; charged defense counsel with receipt of tainted money and with the knowledge that petitioners were guilty (R. 3803-3804); charged that there was not a lawyer in the court room who did not know of petitioners' guilt; and assured the jury that petitioners were the murderers (R. 3807, 3820-3821, 3856). Numerous other instances of the unrestrained excesses of the prosecutor in summation are indicated in the footnote on page 34, *supra*. Their effect was aggravated by a charge which (R. 4087) "took on the character of a summation for the People."

(B) *The Trial Judge's Actions*

(1) The Trial Judge recognized at the opening of the trial that "When the human mind registers, it is not likely to readily forget its impressions" (V. 49). During the selection of the jury, he sought to impress the talesmen with the feeling that he had some community of interest with them—this was done by questions about such irrelevant matters as their genealogy, acquaintances and business, church, fraternal and social affiliations, and the general

character of and landmarks about the vicinity of their homes or business (e. g.,—out of at least 125 instances—V. 120, 369, 467, 507, 999, 1397). The bond thus created between the Court and the jury was turned against petitioners by the Court's comments throughout the trial. By these comments the jury was made to believe that the Court's efforts to administer justice fairly were being frustrated by the deliberate attempt of defense counsel to obstruct justice (e. g., R. 783, 884, 948, 993, 2170-2171, 2592). Two typical instances follow:

(R. 2170-2171)

> "You are distinctly rude and uncivil. The Court refuses to be goaded to the extent that you are obviously trying to goad the Court at this or any other time. The Court will be patient to the utmost and take it on both cheeks from counsel. Now please proceed."

(R. 2603)

> "Gentlemen of the jury, disregard that. These are just tactics trying to set the jury against the Court, thereby lessening the authority of the Court with the jury—giving the Court instructions."

(2) By methods sometimes direct, sometimes subtle, the Trial Judge virtually told the jury that admissions wrung from prosecution witnesses on cross-examination were of no consequence. Illustrative of this type of animadversion is the Court's comparison of Rubin's draft evasion in the First World War with the historic refusal of William Penn to enter military service (R. 1512). The Trial Court provided an explanation by which to reconcile inconsistent testimony which Bernstein had given as a prosecution witness in an earlier murder trial: in the so-called "Gangi Cohen" trial, Bernstein had denied being involved in any murders (R. 1111-1113). This was contrary to the testimony given in the present case. The Court said (R. 1113-1114):

> "The answer given to the question you have just read in the other trial could be viewed as being meant to be

true by the witness if he considered it referred to taking part in the actual shooting. It would be untrue in relation to his being a principal under Section 2 of the Penal Law, in the other work than killing."

Damaging indeed was the Court's reference to a prior statement made by Rubin exonerating Buchalter of any complicity in the Rosen murder. He suggested to the jury (R. 2404-2406) that the prior statement was false and that its falsity was commendably akin to the white lie told by the priest's sister in Victor Hugo's "Les Miserables". This had a double vice: It not only excused the perjury itself, but it also assumed that Rubin's testimony in the present trial was unquestionably true, and that it was the prior statement which was false. The jury was not left to decide which one of the two inconsistent statements was true and which one was false. The Court decided that for the jury, against petitioners.

Other instances where the Court cancelled the effect of the cross-examination of prosecution witnesses, or neutralized it by interpreting answers, appear at R. 779, 782-783, 819-820, 846, 870, 872, 884, 903, 933, 991, 1021, 1035, 1060, 1164, 1172, 1177, 1205, 1216-1217, 1224, 1231, 1232, 1236, 1251-1253, 2498, 2512, 2538, 2580, 2589, 2591-2593, 2597-2598.

The Judge, moreover, arbitrarily refused to permit defense counsel to examine on matters elicited on direct examination, or brought out on co-defendants' cross-examination (e. g., R. 2405, 2065, 1653, 2064, 295, 300, 1055, 1082, 1136, 1510, 1513)*; made disparaging remarks about counsel's purposes in their inquiries and about the materiality of evidence sought to be adduced (e. g., R. 1974-1975, 3870, 3867, 3865, 3869, 3868, 2170-2171); and unduly restricted cross-examination on questions (a) tending to show the consideration being given to the witness for his testimony (R. 1138, 1144, 1146-1147), and (b) otherwise directly

* See also, R. 1131-1134, 1139, 1159, 1175, 1176, 1177-1178, 1189, 1194, 1195, 1198-1200, 1201-1202, 1227-1228, 2532, 2569-2571, 2571-2572, 2577-2578, 2586-2589.

affecting witness' credibility (R. 1094-1095, 1136-1139, 1155, 1232-1233, 2530-2532, 2569-2571, 2577-2578, 2597-2598).

While the Trial Judge need not be an automaton, and may participate actively in the trial, he is not justified in being a protagonist for the prosecution. Enough has surely been shown to make it clear that by the trespasses upon its province, this jury was effectively prevented from according the petitioners the full and fair hearing "due process of law" requires.

(C) *The Charge*

(3) This course of conduct during the trial culminated in a charge which constituted the *coup de grace*. The Trial Judge revealed his state of mind and purpose in his charge when he boldly said, "* * * I think this * * * will hold and will not be error" (R. 3990). Does that not plainly suggest that the Court counted on the jury to convict, as otherwise, of course, there would not be an appeal?

The charge must be read as a whole to appreciate how gravely it invaded petitioners' rights and the concept of fundamental fairness. No excerpt can serve as more than a slight indication of how issues of fact were resolved against petitioners and how the Judge himself gave testimony of matters not otherwise proved.

The jury was invited by the Court to assume that the obvious discrepancy between the testimony of Rubin and Berger, on the one hand, and Bernstein on the other, concerning the "time table" (p. 8, *supra*) might be reconciled by a speculation that Buchalter had made full arrangements for the murder, even before he knew that Rubin's mission to Weinstein for the purpose of placating Rosen had failed. The Court said (R. 3906-3907):

> "In view of the fact that this was particularly discussed in reference to hour of the day, and it was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which

preceded the pointing out, that that proved that the testimony did not hitch.

"Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.

"Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

"Apparently, in the argument that was offered, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled."

When the attention of the Judge was called to the fact that the testimony did not support any such assumption, he "corrected" the error with an even more damaging instruction, i. e., that the argument of defense counsel attacking the "time table" must be disregarded because there was lacking any basis for an assumption that Buchal-

ter *had not* communicated his orders earlier in the day. The Court said (R. 3989-3990):

> "I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: 'Sometime about one o'clock, I imagine, in the afternoon.'
>
> "My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this * * * —that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails."

This was, in effect, directing the jury to disregard the conflict in the testimony because petitioners had not proven affirmatively the absence of communication between Buchalter and Weiss before 1 o'clock on September 11, 1936. He used the excuse of avoiding speculation to force the jury to take as a fact what was pure speculation.

Under the pretext of "segregating" evidence against the individual petitioners for the purpose of assisting the jury, the Judge restricted his review of the facts (R. 3903 *et seq.*) to a recitation of only the incriminating testimony given by the prosecution witnesses, Bernstein, Rubin, Berger, Tannenbaum and Magoon. He quoted questions and answers from the record, without referring to the cross-examination which destroyed the force of the testimony of these witnesses (e. g., R. 3903, 3909-3910, 3914, 3916).

In a word, the Court prepared a statement of the case particularizing the damning proof but omitting all countervailing material. A more one-sided charge can hardly be imagined.

The charge was particularly unfair because of its disparagement of cross-examination. The Court's excuse for this omission was that recollection of the cross-examination was "your [the jury's] job". Almost in the same breath he invited the jury to disregard cross-examination completely by saying (R. 3903) that "while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss: it is blank cartridge shooting."

Had the Court been entirely consistent in omitting all reference to cross-examination, the unfairness might not have been so prejudicial. However, it should be noted that the Court did refer to cross-examination for the purpose of excusing and explaining material which impeached the credibility of prosecution witnesses or contradicted their stories.

For example, regarding the conflict of Bernstein's testimony on the trial as against that before the Grand Jury (R. 1266-1267), the Trial Judge said (R. 3899-3900):

> "Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it may take ten weeks to get all the evidence before

a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. *You will just disregard it.* The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here. Bear that in mind. *Don't be misled by that argument.*" (Italics supplied.)

We have already noted (p. 35, *supra*) the Court's rescue of Magoon (R. 3998-3999) from his reference to "little white lies" by branding the summation of counsel in this respect as childishness which "should not affect intelligent men whose minds are mature."

Practically all the prosecution's criminal witnesses were cross-examined concerning statements made by them under oath within a few months prior to the trial inconsistent with their present testimony. As if rehearsed, a stock reply was always given, "If it is in the book [meaning the record being read from], it is so." The purpose of this examination was to establish prior inconsistent statements and thus attack the credibility of the witness. This proper purpose was frustrated when the Court charged (R. 3894):

"Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is *an unholy thing.* We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, 'Answer yes or no,' about something that he testified to a long time before, you get a normal response sometimes, 'If it is in the book, it is so.' There is a concession of the accuracy of the minutes the witness is not disputing." (Italics supplied.)

The apology for the prosecution was made complete when the Court in his main charge said (R. 3903):

> "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. *When rogues fall out, it is a wise man's delight*; * * *" (Italics supplied.)

The unfairness of this statement was aggravated rather than corrected when the Court, after exception had been taken, said (R. 3989):

> "That was intended to have general application. It was not intended as calling the defendants names, but, lest it be misunderstood as having specific application to the defendants as rogues, the court withdraws and apologizes for it. It was not so meant. Just disregard it."

Whether the statement was error which was cured by the apology is not the question here. We urge that the comment demonstrates the innate prejudice which was in the Court's mind and which colored the entire trial.

It was the contention of the prosecution that the witnesses called by them had no opportunity to concoct their stories. In substantiation thereof, Bernstein testified that he had been under twenty-four-hour surveillance (R. 829-831), with a detective sitting at his bedside while he slept (R. 1026), and that he had had absolutely no opportunity to communicate with the outside world (R. 975-976). Subsequently, on cross-examination, Bernstein was forced to admit that he had written a number of letters of a scurrilous and threatening nature (R. 1247, 1256, 1259).* These letters (which were erroneously excluded) were definitely material and would have exploded the prosecution's contention. It should be noted that not a single police officer who guarded these witnesses was called to testify. Not-

* The contents of these letters are set forth in petitioner Capone's original petition, pp. 48-50; see also, this brief, footnote on pp. 4-5.

withstanding this proof, the Court charged as follows (R. 3955-3956):

> "The Court: I will read that because I have a different ruling. It reads, 'I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them.'
>
> "The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.
>
> "Mr. Rosenthal: May I respectfully except?
>
> "The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.
>
> "Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.
>
> "The Court: I find that it is not. I find it is all guesswork.
>
> "Mr. Rosenthal: Then I respectfully except.
>
> "The Court: The jury is not permitted to guess.
>
> "Mr. Rosenthal: May I respectfully except.
>
> "The Court: You go by evidence, not by guess work. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.
>
> * * * * * *
>
> "The Court: That would be sloppy police work, to permit discussion."

The lack of judicial balance between the State and the petitioners is again shown by the Court's treatment of the defense of alibi tendered by Weiss.

The alibi was to the effect that on the night of September 12, a time when he was supposed to have been with Bernstein at the scene of the crime, he was actually attending a birthday party for his brother. Five witnesses testified to this and their testimony covers almost 400 pages of the record (R. 3070-3454). Yet, the Court's charge was entirely silent on this alibi. Counsel for petitioner requested the Court "to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi." He urged that if the alibi raised a reasonable doubt, the defendant was entitled to acquittal. The Court refused to charge as requested, and the instructions given were prefaced by the casual remark (R. 3949):

> "The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:" *

No adequate opportunity for defense (cf. *Twining* v. *New Jersey*, 211 U. S. 78, 112) has been afforded where, as here, the last word of the Court, the final instructions to the supposed triers of the fact, removed from their consideration, and determined adversely to the defense, issues of fact vital to the decision of the case.

As was said in *People* v. *Ohanian*, 245 N. Y. 227, 230:

> "The judge's repeated comments and his charge assumed the falsity of the defense. The practical effect of them may be viewed as morally depriving the jury of its freedom of action and as coercing it into reaching such a verdict as perhaps it might not otherwise have rendered."

In the poisoned atmosphere at this trial, even the outward manifestations of fairness gradually disappeared as the trial proceeded. Particularly apposite to this case is the

---

* During the summation the Trial Judge said (R. 3773): "The charge has been prepared * * *."

language of the Supreme Court of Pennsylvania, per Maxey, *J.*, in *Commonwealth* v. *Petrillo*, 338 Penna. 65 (12 Atl. (2d) 317, 331):

> "• • • There is no other case which calls for such strict impartiality on the part of a trial judge and such fearless adherence by him to these 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102) as those cases which have been sensationalized in the public press. In all such cases there is much public *prejudgment* and this is always adverse to *any* of those at whom the finger of accusation points. Anyone mentioned as *in any way connected* with those accused is in the public mind already condemned. No trial judge should permit his judgment and sense of good taste to be warped because of his official participation in a 'front page' case." (The emphasis is the Court's.)

The Trial Judge here, however, did permit his judgment to be warped. He did unmistakably communicate to the jury his personal belief that these petitioners were guilty. Again quoting from *Commonwealth* v. *Petrillo*:

> "The law confers on no judge the power of *pre*-judgment. A defendant charged with crime is not likely to receive a fair and impartial trial, if the judge from the beginning exhibits an attitude which conveys to the jury the impression: 'Here is a man guilty of an atrocious murder but of course we have got to go through the *form of a trial* before we send him to the electric chair.'" (Emphasis is the Court's.)

This is no question of form; it is one of substance. The right to be heard is more than just the right to speak (often even that was barred in this case). It is an empty form if the speech is to deafened ears; and no less so if the mind of the hearers is closed to reception, or directed to reject perception.

As one of the dissenting Judges (Rippey, *J.*) said (R. 4090):

> "• • • the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses."

CONCLUSION

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

Four of the seven judges in the Court of Appeals remained unconvinced of petitioners' guilt (cf. *People* v. *Crum*, 272 N. Y. 348, 350). Three expressed firm belief that the judgment of death should be reversed because, "that fundamental fairness" being absent, these petitioners did not have a fair trial.

There can be no fundamental fairness where the scales of justice at the outset of a trial are weighted against the defendants, or where the evenness of balance is disturbed during the trial by factors apart from the quality of the evidence adduced.

The State of New York has deprived petitioners of their liberty, and, unless this Court intervenes, will deprive them of their lives, without due process of law. There was a complete disregard of those criteria which this Court has announced to be the minimal standards for the administration of justice in a civilized community. The verdict was predestined by the wave of hysteria which engulfed the jury, the Trial Judge and the prosecutor. In the face of this hysteria, the machinery of justice in the State of New York, usually amply adequate to safeguard the rights of

persons accused of crime, broke down. Processes ordinarily sufficient for the administration of justice (see *People* v. *Becker*, 210 N. Y. 274) failed entirely in this case.

The Court of Appeals did not say that the jury was impartial; it held that, because of a local statute, the question of fairness in the selection of the jury could not be reviewed. It did not say that the contents of the police records were irrelevant to the issue; the holding was that they were inconclusive. These two elements, if nothing else were present, furnish justification for petitioners' contention that the State failed to provide corrective process for the violation of a right guaranteed by the Federal Constitution.

There was complete disregard of the concept that "whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime" (*People* v. *Barbato*, per Pound, J., 254 N. Y. 170, 178).

But there is far more in the record to support the contention of petitioners. They submit that the record demonstrates, as they undertook in their petitions for writs of certiorari to show:

A) That the trial was held in an atmosphere which precluded the selection of a fair jury;

B) That the essential witnesses for the prosecution were self-confessed gangsters, thugs and murderers who had the most compelling motive, that of saving their own lives, to perjure themselves in accusing petitioners;

C) That these criminals had every opportunity to correlate their stories;

D) That the Court explained, minimized and condoned their perjuries;

E) That the surroundings of the trial conditioned the jury toward conviction; there was a show of force in the

court room; the defendants wore manacles which were removed only in the presence of the jury; the witnesses were surrounded by police officers;

F) That important evidence was suppressed and petitioners were denied access thereto;

G) That the Trial Judge disparaged cross-examination by which, in the words of Chief Judge Lehman, the testimony of prosecution witnesses was, "impeached, if not completely destroyed"; that the attorneys for petitioners were belittled by the Court, and arguments made by them were discredited;

H) That the prosecutor improperly and deceitfully assured the jury that the criminal witnesses for the prosecution would receive their just desserts; that, in summation, the prosecutor was permitted to interject the issue of his personal integrity and to charge defense counsel with being devil's advocates hired with tainted money. These "foul blows" could neither be stopped nor answered; the Judge forbade all interruptions.

I) That the Trial Judge usurped the functions of the jury.

The trial was one in form, not in substance. The prosecutor misused his power as an instrumentality of the State. Neither the jury nor the Judge was impartial.

A printed Record makes a case appear remote from the human factors involved. The concept of due process is not based on abstract theory; it is the foundation of our way of life. We all feel more secure in our daily lives in the knowledge that we in the United States are protected by the law from judgments based on hysteria and passion, even from the tyranny of men's emotions, and that our lives and property are safe against deprivation except after fair trial before a fair tribunal. As opposed to a society based on apprehension and fear, where no man

can be sure where he stands or how he will fare, ours is a society of freedom and security where individuals, whatever their status—even "bad" men—are protected by constitutional guarantees against public clamor and official vindictiveness. The presumption of innocence prevails until judgment of guilt has been rendered after fair trial by an impartial Judge and jury. It is unthinkable that men may be deprived of their lives, not because of what they did, but because of the way they were tried.

"Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." *Hill* v. *Texas*, 316 U. S. 400, 406.

Respectfully submitted,

I. Maurice Wormser,
J. Bertram Wegman,
Counsel for petitioner Buchalter.

Arthur Garfield Hays,
John Schulman,
Counsel for petitioner Weiss.

Gerald Weatherly,
with them on the brief.

Sydney Rosenthal,
Counsel for petitioner Capone.

Benj. J. Jacobson,
with him on the brief.

APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

ARTICLE I, SECTION 2.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.

New York State Constitution

ARTICLE I. SECTION 6.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Judicial Code of the United States

TITLE 28, U. S. C., SECTION 344 (SECTION 237 OF THE JUDICIAL CODE, AS AMENDED).

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

New York Judiciary Law

SECTION 749aa. SPECIAL JURORS IN CERTAIN COUNTIES.

* * * * * *

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or

who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

• • • • • •

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

• • • • • •